

INS v. CHADHA: THE
ADMINISTRATIVE CONSTITUTION,
THE CONSTITUTION, AND THE
LEGISLATIVE VETO

The law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism. . . .
[OLIVER WENDELL HOLMES, JR. (1881)]¹

[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.

[CHIEF JUSTICE WARREN BURGER (1983)]²

Holmes's view that policy, not logic, shapes the law is particularly apt for constitutional law. There are some who deplore that judges base constitutional decisions on their personal views of good policy,³ but hardly anyone denies that judges are in fact guided by "sense" as well as "syllogism." Judicial policymaking remains controversial in many areas of constitutional law, but in some it has long since been widely accepted that judgment as well as reason should influence judicial decisions. Historically cases involving the separation of powers have been in this category.

The main line of the tradition, dominant at least since *McCulloch v. Maryland*,⁴ is that practical effects, not abstract formulas alone, should

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¹ HOLMES, *THE COMMON LAW* 32 (Howe ed. 1963).

² *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2780-81 (1983).

³ See, e.g., Easterbrook, *Substance and Due Process*, 1982 SUPREME COURT REVIEW 85, 125; KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970).

⁴ 4 Wheat. 316, 407 (1819). For a discussion of *McCulloch v. Maryland* from a separation of powers perspective, see TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 228-29 (1978).

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guide the Court in separation of powers cases. This is not to say, of course, that "syllogism" counts for naught; to go that far would be to repudiate the core of constitutionalism. Instead, an unresolved tension between sense and syllogism has sustained constitutional jurisprudence in separation of powers cases at least since Holmes.

The conflict between instrumentalism and interpretivism—between policy and text—is, of course, not limited to separation of powers cases. Tension between these competing approaches to interpreting the Constitution underlies most areas of law. But in separation of powers cases, where few deny that both sense and syllogism must have weight, the conflict often breaks out into the open. Speaking for a unanimous Supreme Court in upholding the Iranian hostage release agreements, Justice Rehnquist wrote:⁵

[I]t is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. . . . [W]e freely confess that we are obviously deciding only one more episode in the never-ending tension between . . . a world that presents each day some new challenge . . . and the Constitution . . . which no one disputes embodies some sort of system of checks and balances.

In this area, the Court has sought to maintain a balance between generalizations and practical accommodations. Thus, Chief Justice Burger's formalistic opinion for the Court in *Immigration and Naturalization Service v. Chadha*⁶ came as a shock. In *Chadha*, the Court held unconstitutional the legislative veto in §244(c)(2) of the Immigration and Nationality Act,⁷ which authorized either House of Congress to disapprove by resolution the Attorney General's decision to suspend deportation of an alien. For years, distinguished legal scholars as well as officials of the Department of Justice have questioned the constitutionality of the legislative veto,⁸ arguing that it

⁵ *Dames & Moore v. Regan*, 101 S. Ct. 2972, 2976-78 (1981).

⁶ 103 S. Ct. 2764 (1983).

⁷ 8 U.S.C. §1254(c)(2) (1976). "Legislative veto" herein refers to a statutory provision by which Congress has reserved to itself, or to one of its houses or committees, the power to override actions by officials of the Executive branch or of independent agencies.

⁸ The list of scholars who have testified in congressional hearings that the legislative veto is probably unconstitutional is a virtual Who's Who of American constitutional law, and includes Charles Black, Alexander M. Bickel, Philip B. Kurland, and Laurence Tribe. Statements by scholars and officials of the Department of Justice questioning the constitutionality of the legislative veto are collected in McGowan, *Congress, Court and Control of Delegated Power*, 77 COL. L. REV. 1119, 1136-45 (1977); BOLTON, *THE LEGISLATIVE VETO: UNSEPARATING THE POWERS* 9-13, 43-46 (1977).

infringes on the President's veto power, and in the case of the one-house veto, that it violates the principle of bicameralism as well. What was astonishing about *Chadha* was not the result, but the scope and inflexibility of the Court's opinion.⁹

Justice White, who alone dissented from the merits of the Court's separation of powers analysis,¹⁰ proclaimed *Chadha* to be of "surpassing importance" because it "sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto' . . . Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."¹¹ Justice Powell, concurring in the judgment on the "narrower ground"¹² that the legislative veto in this particular case infringed on judicial power, seconded Justice White's assessment: "The Court's decision . . . apparently will invalidate every use of the legislative veto."¹³

Dissenting opinions are a notoriously inaccurate source of insight into the implications of Supreme Court decisions, but in this instance, the predictions were quickly confirmed. Only days after *Chadha*, the Court affirmed summarily two decisions declaring legislative vetoes unconstitutional in circumstances arguably distinguishable from *Chadha*.¹⁴ Again Justice White dissented, protesting that "[w]here the

⁹ Cf. Tribe, note 4 *supra*, at 162-63: "There is some appeal in the argument that any congressional veto of an executive or administrative act taken pursuant to a prior delegation must constitute either a usurpation of the judicial function of interpreting the scope of the original delegation, or a change in that delegation's initial scope. If it is the former, the legislative veto impermissibly interferes with the judicial power; if it is the latter, the legislative veto is tantamount to a new law and must therefore be passed by both Houses and submitted to the President for his approval or veto. But the difficulty with any such syllogistic approach is that it appears to exalt rigid formulas in an area where doctrine must be responsive to basic problems of political accountability and due process rather than to any mechanistic separation of functions [emphasis added]." See also McGowan, note 8 *supra*, at 1152: "[C]onventional legal analysis alone is unlikely to establish definitively the constitutionality vel non of the one-house veto or similar legislative control devices. In the final accounting, one's position is likely to depend much more on a subjective assessment of how our constitutional system will best function than on close textual analysis of constitutional language. . . ."

¹⁰ Justice Rehnquist filed a separate dissenting opinion, in which Justice White joined, questioning the Court's determination that the legislative veto was severable. 103 S. Ct. at 2816-17.

¹¹ *Id.* at 2792, 2810-11.

¹² 103 S. Ct. at 2789.

¹³ *Id.* at 2788.

¹⁴ *Process Gas Consumers Group v. Consumer Energy Council*, 103 S. Ct. 3556 (1983), affirming *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982); *United States Senate v. FTC*, 103 S. Ct. 3556 (1983), affirming *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982).

[legislative] veto is placed as a check upon the actions of the independent regulatory agencies, the Article I analysis relied upon in *Chadha* has a particularly hollow ring."¹⁵ The Court, however, refused to hear argument in the cases, or even to remand them to the lower courts for reconsideration in the light of *Chadha*. It appeared, for the moment at least, that the Court had definitively disposed of the legislative veto in *Chadha*. The popular press concurred.¹⁶

Something even more fundamental than the ruling on the legislative veto was at issue in *Chadha*. According to the Court, the case turned on the plain wording of "[e]xplicit and unambiguous provisions of the Constitution [which] prescribe and define the respective functions of the Congress and of the Executive in the legislative process."¹⁷ Justice White denounced the majority's approach, however, as "reflect[ing] a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state."¹⁸ To the majority, on the other hand, Justice White seemed to be offering a mere "utilitarian argument" that the legislative veto is a "useful 'political invention'," an argument which the Court dismissed as raising policy considerations not rising to the level of constitutional significance. Thus, the difference between Justice White and the majority goes deeper than disagreement over the legislative veto. It goes to the very nature of the Constitution and to how judges are to go about relating it to the rapidly evolving structure of the "modern administrative state."

I

A. THE FACTUAL BACKGROUND

Jagdish Rai Chadha came to the United States from Kenya on a British passport in 1966. After his student visa expired, the Immigration and Naturalization Service (INS) began deportation proceedings. Chadha conceded that he had overstayed his visa and applied for suspension of deportation on grounds of extreme hardship.²⁰

¹⁵ *Consumer Energy Council*, 103 S. Ct. at 3558.

¹⁶ E.g., Greenhouse, *Supreme Court*, 7-2, *Restricts Congress's Right to Overrule Actions by Executive Branch*, NEW YORK TIMES, June 24, 1983, at 1, col. 6; *An Epic Court Decision*, TIME, July 4, 1983, at 12.

¹⁷ 103 S. Ct. at 2781.

¹⁸ *Id.* at 2810.

¹⁹ *Id.* at 2781.

²⁰ Under §244(a)(1) of the Immigration and Nationality Act, the Attorney General "may, in his discretion" suspend deportation and grant permanent resident status to an alien who has been

An INS immigration judge ruled in June 1974 that Chadha's request for a suspension of deportation should be granted, in part because he had been born of Indian parents and "it would be extremely difficult, if not impossible, for [Chadha] to return to Kenya or go to Great Britain by reason of his racial derivation."²¹

The suspension of deportation was duly reported to Congress as required by statute,²² and on December 16, 1975, the House of Representatives, without debate or recorded vote, adopted a resolution disapproving the suspension of deportation in the cases of Chadha and five other aliens. The chairman of the House Subcommittee on Immigration, Citizenship, and International Law, who sponsored the resolution of disapproval, stated that after reviewing 340 cases in which suspension of deportation had been granted by the INS, the subcommittee had concluded that in six of them the statutory criteria had not been met, "particularly as it relates to hardship."²³ Under the terms of the Immigration and Nationality Act, if either house of Congress passes a resolution "stating in substance that it does not favor the suspension of . . . deportation, the Attorney General shall thereupon deport such alien. . . ."²⁴ Thus, the House resolution had the effect of overruling the INS's order suspending Chadha's deportation and reasserting the INS's statutory duty to deport him.

Chadha filed a petition for judicial review of the INS proceedings, arguing, among other things, that the legislative veto of the Attorney General's suspension of deportation was unconstitutional, and the United States Court of Appeals for the Ninth Circuit agreed. Although the INS had supported Chadha's position in the court of appeals that the legislative veto was unconstitutional, it filed an appeal to the Supreme Court, and the House and Senate both filed petitions for certiorari.

The constitutionality of the legislative veto had been challenged before, but the Supreme Court had always declined to reach the constitutional issues.²⁵ In *Chadha*, however, the Court brushed aside

in the United States for seven years, is of good moral character, and whose deportation would "in the opinion of the Attorney General, result in extreme hardship" to the alien or other persons including "a spouse." 8 U.S.C. §1254(a)(1) (1976).

²¹ 634 F.2d 408, 411 (9th Cir. 1980), *affirmed*, 103 S. Ct. 2764 (1983).

²² 8 U.S.C. §1254(c)(1) (1976).

²³ 103 S. Ct. at 2771.

²⁴ §244(c)(2), 8 U.S.C. §1254(c)(2) (1976).

²⁵ *Buckley v. Valeo*, 424 U.S. 1, 140 n.176 (1976); *cf. id.*, 257, 284-86 (White, J., concurring); see also *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977); *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (*en banc*) (*per curiam*), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

several threshold issues that offered promising opportunities for avoiding the merits.²⁶ The Court's handling of two threshold issues was particularly curious. First, the Court held that the INS was an "aggrieved party" entitled to appeal under 28 U.S.C. §1252 (1976), although in the court of appeals the INS had supported Chadha's position that the legislative veto was unconstitutional.²⁷

The Court's rejection of a second threshold argument was even more dubious. In 1980, Chadha married a United States citizen, and thus became eligible to apply for permanent resident status as an immediate relative of a United States citizen.²⁸ Congress suggested that the Supreme Court should decline to reach the merits of Chadha's constitutional claims since other, narrower avenues of relief were now available.²⁹ The Court brushed this point aside with the curt rejoinder that whether Chadha would prevail if he pursued alternative avenues of relief was "speculative."³⁰ But in other contexts which do not involve constitutional issues, and where the grounds for judicial restraint are therefore less weighty, the Court routinely requires the exhaustion of administrative remedies even though it is not certain that the claimant will prevail.³¹ It is hard to understand why the Court should rule on a major constitutional issue if routine statutory grounds for granting relief could make the constitutional ruling unnecessary.

Chadha's marriage to a citizen also provided a second reason for declining to reach the merits, which the Court apparently overlooked. The stated explanation for the House's exercise of its veto was that there had been an insufficient showing of hardship in Chadha's case. Hardship "to a spouse" is an additional statutory ground for granting suspension of deportation. If the Court had remanded to the INS for reconsideration, it is possible, perhaps even likely, that the INS could have found additional new grounds for suspending Chadha's deportation based on the hardship to his spouse. It is doubtful that the House would have exercised its legislative veto over a new suspension of deportation based on hardship to Chadha's spouse, since this ground is far less innovative and controversial than the racial discrimination rationale originally relied on by the INS.

²⁶ 103 S. Ct. at 2772-80.

²⁷ 103 S. Ct. at 2777.

²⁸ See 8 U.S.C. §§1255(a) and 1203(a)(2) (1976).

²⁹ Cf. *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)

³⁰ 103 S. Ct. at 2777.

³¹ See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

The Court in *Chadha* was not compelled to decide the constitutional issues, but had to overcome formidable obstacles to reach them. The fact that several other cases challenging legislative vetoes were already on the Court's docket may explain why the Court chose to face the constitutional issues squarely in *Chadha*,³² but it does not excuse the Court's action in reaching out to decide important questions of constitutional law unnecessarily. The function of the case or controversy requirement in disciplining the Court's view of the law might have been better served had the Court waited for another case.

B. THE COURT'S REASONING

The Supreme Court's analysis of the legislative veto in *Chadha* turns on relatively narrow constitutional issues. The Constitution contains three "[e]xplicit and unambiguous provisions"³³ governing lawmaking by Congress. Before a bill becomes a law, it must be "presented" to give the President an opportunity to exercise his veto.³⁴ This presentment requirement applies not only to "Bills," but also to "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary."³⁵ In addition, the Constitution vests the legislative power of the United States in a bicameral legislature composed of a Senate and a House of Representatives.³⁶ Before a bill becomes a law, it must be passed by both houses of Congress. The central question presented in *Chadha* was whether the procedural requirements for passing laws—presentment and bicameral action—also apply to the legislative veto.³⁷

³² *Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *app. docketed sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 51 U.S.L.W. 3002 (April 29, 1982) (Nos. 81-2008 etc.), *aff'd*, 103 S. Ct. 3556 (1983); *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (*en banc*), *app. docketed sub nom. U.S. Senate v. FTC*, 51 U.S.L.W. 3470 (Dec. 12, 1982) (Nos. 82-935 etc.), *aff'd*, 103 S. Ct. 3556 (1983); see also Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 294 n.105 (1982).

³³ 103 S. Ct. at 2781.

³⁴ "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; . . ." Art. I, sec. 7, cl. 2.

³⁵ Art. I, sec. 7, cl. 3.

³⁶ Art. I, sec. 1.

³⁷ See Scalia, *The Legislative Veto: A False Remedy for System Overload*, REGULATION 19, 20 (Nov./Dec. 1979): "The validity of the legislative veto, then, turns quite simply upon whether it in reality constitutes lawmaking" which must comply with the requirements of presentment and bicameralism. It has been suggested that the legislative veto may also violate a more general

Chief Justice Burger's opinion for the Court in *Chadha*, which was joined by five other Justices, gives three reasons for concluding that the legislative veto is legislative action of the kind to which the Constitution's presentment and bicameralism requirements apply. None of the three is ultimately persuasive.

1. *Presumption.* The Court begins with the proposition that the Constitution divides the powers of the federal government into "three defined categories, legislative, executive and judicial."³⁸ While conceding that they are not "hermetically" sealed from one another,³⁹ the Court contends that the powers of each branch are "functionally identifiable" and that "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. See *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928)."⁴⁰

The Court's reasoning is unpersuasive for several reasons. In the first place, the Court is mistaken when it asserts that the framers "defined" the categories legislative, executive, and judicial in the Constitution. Not only is the Court incorrect—the Constitution does not define these terms—but the slip is revealing. The Court's conceptualistic approach to analyzing the issues conflicts with the more pragmatic approach which the framers actually espoused. In Federalist No. 37, for instance, Madison warns that any attempt to define the categories legislative, executive, and judicial in abstract, theoretical terms is bound to fail.⁴¹ The most that can be said is that the Constitution uses the terms "legislative," "executive," and "judicial," but that rather than attempt to define these concepts in the abstract, the framers left to subsequent history the working out of the relationships among them.

Nor is the Court's conceptualistic approach to the issues in *Chadha* supported by the case which it cites, *Hampton & Co. v. United States*. *Hampton* is a 1928 decision in which the Court upheld a statute giving

constitutional "separation of powers principle." *Consumer Energy Council v. FERC*, *supra*, 673 F.2d at 470-77 (Wilkey, J.). The Supreme Court specifically declined to rest its analysis in *Chadha* on separation of powers principles as "an abstract generalization," but focused instead on specific provisions of the Constitution. 103 S. Ct. at 2781.

³⁸ *Id.* at 2784.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ "Experience has instructed us that no skill in the science of government has yet been able to discriminate and define with sufficient certainty its three great provinces—the legislative, executive and judiciary; or even the privileges and provinces of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science." Federalist No. 37 (Madison), in *THE FEDERALIST PAPERS* (Fairfield ed. 1961).

the President power to modify tariffs against a claim that it constituted an impermissible delegation of legislative powers to the Executive.⁴² If anything, the result in *Hampton* contradicts the Court's claim that the powers of each branch are "functionally identifiable." Nor is there any discussion of "presumptions" in *Hampton*, the proposition for which the Court ostensibly cites it. In *dictum*, Chief Justice Taft does say that it would be "a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President."⁴³ On a superficial, linguistic level, then, the case might be read to support the proposition that when Congress acts it must be exercising "legislative" power. It is one thing, however, to deploy a presumption of regularity to conclude that when Congress acts it is within the scope of authorized legislative powers, but quite another to rely on presumption to support the conclusion that a branch has acted in an unconstitutional manner.⁴⁴

Even on its own terms, however, the Court's presumption sweeps in too much and proves too little. Conceding that the legislative veto is an exercise of Article I legislative power (as opposed to executive or judicial powers) does not resolve, but only poses the question before the Court. The Constitution does not require presentment to the President of all congressional actions within Article I legislative power. On the contrary, the text restricts presentment to "Bills" and to "Every Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary. . . ." The most that can be said about the drafting history is that the Constitutional Convention wanted the presentment requirement to apply to bills and to functional equivalents of bills.⁴⁵ Not every exercise of Article I legislative power comes within these categories, as the Court concedes.⁴⁶ Congress has developed extensive powers to oversee the Executive's administration of the laws, for example, as an exercise of

⁴² 276 U.S. at 404.

⁴³ *Id.* at 406.

⁴⁴ See also 103 S. Ct. at 2791 n.7 (Powell, J., concurring: "The Court's presumption provides a useful starting point, but does not conclude the inquiry.")

⁴⁵ Madison wanted to eliminate the possibility that bills could avoid the President's veto by being passed under a different label, 103 S. Ct. at 2782; *id.* at 2799-2800 (White, J., dissenting); 5 ELLIOT'S DEBATES 431 (1845) ("if the negative of the President was confined to bills, it would be evaded by acts under the form and name of resolutions, votes &c."). See Martin, note 32 *supra*, at 295.

⁴⁶ See 103 S. Ct. at 2784. But *cf. ibid.*: "It emerges clearly that the prescription for legislative action in Art. I, §51, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."

Article I legislative powers,⁴⁷ but no one would suggest that these forms of legislative oversight by congressional committees require presentment to the President for his veto.

The question to be decided in *Chadha* was not whether the legislative veto is an exercise of Article I legislative power, but whether it is an exercise of Article I legislative power of the kind that requires presentment and bicameral action.⁴⁸ The Court's presumption that the legislative veto is an exercise of Article I legislative power should only frame, rather than decide, the issue.

2. *Altering legal rights.* The Court does not rely on presumption alone. It goes on to argue that the House resolution vetoing the suspension of Chadha's deportation was "essentially legislative in purpose and effect."⁴⁹ The Court's formalistic approach to the issues is disappointing, but given its source, not surprising. The Court bases its analysis on a nineteenth-century congressional report which construed the Presentment Clause as applicable to any matter which is "legislative in its character and effect."⁵⁰ The core of the Court's reasoning is conceptual and formalistic: the legislative veto is "legislative" because it has the effect of "altering legal rights."⁵¹

The legislative veto "alters legal rights," however, only because the Court chooses to characterize its effect that way. The Court's

⁴⁷ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). See also *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). For a general description of the panoply of oversight techniques available to Congress, see generally KIRST, *GOVERNMENT WITHOUT PASSING LAWS* (1969); SENATE COMM. ON GOVERNMENT OPERATIONS, *STUDY OF FEDERAL REGULATION, II: CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES* (Comm. Print 1977).

⁴⁸ See Scalia, note 37 *supra*. The narrow textual issue is whether the legislative veto is a resolution "to which the concurrence of the Senate and House of Representatives may be necessary. . . ." Art. I, sec. 7, cl. 3. It is hard to question that a two-house veto comes under this language. By definition, a two-house veto is a vote to which the concurrence of both houses is required. Therefore, it is hard to escape the conclusion that a two-house veto not presented to the President is clearly unconstitutional. A one-house veto, however, like that at issue in *Chadha*, is a different matter. In the case of the one-house veto, a statute authorizes one house to act through a resolution to which the concurrence of both houses is not literally "necessary." Antonin Scalia points out that for this reason, at least on a superficial level, the one-house veto stands on a stronger constitutional footing than a legislative veto under a statute which explicitly requires the concurrence of both houses. Scalia contends, however, that this argument is "obviously wrong because it assumes that the Founding Fathers were careful to preserve the presidential veto as a check upon disguised legislative action by both houses of Congress, but were quite willing to let a single house proceed unchecked." Scalia, note 37 *supra*, at 22. In addition, Scalia also argues that a legislative veto requires bicameral action. With due respect, Scalia's analysis, like the Court's in *Chadha*, is circular. It implicitly assumes that the legislative veto, like passage of a statute, is the sort of legislative action that requires the "check" of a presidential veto and bicameral adoption.

⁴⁹ 103 S. Ct. at 2784.

⁵⁰ S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897), quoted, 103 S. Ct. at 2784. See also Martin, note 32 *supra*, at 296 n.107.

⁵¹ 103 S. Ct. at 2784.

manipulation of legal categories could just as easily be turned to support the opposite conclusion that the legislative veto does not alter legal rights.⁵²

The Court maintains that the legislative “purpose and effect” of the legislative veto is clear because:⁵³

The House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch. . . . The one-House veto operated in this case to overrule the Attorney General and mandate Chadha’s deportation; absent the House action, Chadha would remain in the United States.

The first thing to notice about the quoted passage is that the first and the last sentences are not equivalent. There is no question that “absent House action, Chadha would remain in the United States.” But does that really prove that the House resolution had “the effect of altering . . . legal rights”? Not at all, any more than when a prosecutor drops charges for possession of marijuana the defendant thereby acquires the “legal right” to smoke the substance. Admittedly, prior to the House resolution Chadha was in the country legally as a result of the Attorney General’s decision to suspend deportation as a matter of grace. But that does not necessarily support the conclusion that Chadha had a legal right to remain that could only be altered by statute.

Even if it could be said that Chadha had acquired “legal rights,” how were those rights “altered” by the House resolution? After all, the statute authorizing the Attorney General to suspend deportation on grounds of hardship also provided that either house of Congress could veto the Attorney General’s action. Why was the nature of Chadha’s legal rights not defined by the statute creating them?⁵⁴ If Chadha’s only right was what the statute gave him—the right to remain in the country unless one house exercised its legislative veto—then the House’s action did not alter Chadha’s rights: the possibility of a legislative veto was built into them in the first place.

These questions imply, not that the Court’s analysis is incorrect, but that it is arbitrary. The legislative veto “alters legal rights” only because the Court superimposes that conceptualization on the House resolution canceling the suspension of deportation. It would be equally

⁵² See text *infra* at notes 56–61.

⁵³ 103 S. Ct. at 2784–85.

⁵⁴ *Cf. Arnett v. Kennedy*, 416 U.S. 134, 152 (1974).

plausible (and equally arbitrary) to manipulate the Court's abstract legal categories to say that the legislative veto did not alter legal rights.⁵⁵

Justice White makes precisely that argument in dissent when he describes the legislative veto as authority that Congress had "reserved"⁵⁶ in the statute. He goes on to argue from this premise that the legislative veto does not work a "change in the legal status quo,"⁵⁷ and hence that the Constitution's procedural requirements for passing statutes do not apply to the legislative veto. The only case to have squarely upheld the legislative veto, the Court of Claims decision in *Atkins v. United States*,⁵⁸ rested on a similar analysis.⁵⁹ A distinction could be drawn between the *Atkins* statute and the *Chadha* statute. The difference is between a statute which casts the legislative veto as a condition precedent (executive action only goes into effect if Congress does not veto it) as opposed to a statute which makes the legislative veto a condition subsequent (executive action is effective immediately but Congress may nullify it).⁶⁰ In a footnote, however, the Supreme

⁵⁵ The ease with which the "altering legal rights" test may be manipulated is illustrated by events during the Carter Administration. Attorney General Griffin Bell had given an opinion that the one-house legislative veto was constitutional in legislation authorizing the President to reorganize government departments. Letter from Griffin B. Bell to President Carter (Jan. 31, 1977), reprinted in *Providing Reorganization Authority to the President: Hearings Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations*, 95th Cong., 1st Sess. 40 (1977). A few months later, Assistant Attorney General (now Judge) Wald attacked a different proposal for a legislative veto as unconstitutional, distinguishing it as a situation in which one House could "effect [*sic*] the implementation of a substantive statute which determines the rights of those subject to it." Letter from Patricia M. Wald to Rep. Peter W. Rodino Jr., 6 (May 5, 1977), quoted McGowan, note 8 *supra*, at 1141.

⁵⁶ 103 S. Ct. at 2804.

⁵⁷ *Id.* at 2806.

⁵⁸ 556 F.2d 1028 (Ct. Cl. 1977) (plurality opinion).

⁵⁹ In *Atkins*, the Court of Claims held that a one-house veto of a Presidential recommendation to increase judicial salaries did not alter existing legal rights but merely cancelled an expectancy. The veto is "certainly not making new law . . . but only preserves the legal status quo." 556 F.2d at 1063. The Court went on to acknowledge that the President's "recommendations" would have "become the law" if there had been no legislative veto, but maintained that it was significant that "the Act did not make them law automatically, but only gave them that effect absent objection from either House of Congress." *Ibid.*

⁶⁰ The Salary Act, upheld in *Atkins*, was construed to contemplate a "recommendation" which would only go into effect if it were not vetoed, whereas the portions of the Immigration and Nationality Act struck down in *Chadha* authorized a "suspension" of deportation which was effective until vetoed. Perhaps the legislative veto in §244 of the Immigration Act would have passed constitutional muster had it been written in terms of an Attorney General's "recommendation for a suspension of deportation" which would become effective if not vetoed by Congress. Cf. Lewis, *Legislative Veto Case Leaves Much Unsettled*, NEW YORK TIMES, July 3, 1983, at E5 (reporting vote by the House to require Consumer Product Safety Commission rules to be adopted by Joint Resolution of both houses and signed by the President before taking effect). Perhaps it would even be enough if Congress amended the statute to state explicitly that

Court in *Chadha* appears to reject outright the Court of Claims' analysis in *Atkins*.⁶¹

Neither can we accept the suggestion that the one-House veto provision in §244(c) (2) either removes or modifies the bicameralism and presentation requirements for the enactment of future legislation affecting aliens. See *Atkins v. United States*, 556 F.2d 1028, 1063-64 (Ct. Cl. 1977). *cert. denied*, 431 U.S. 1009 (1978); Brief for the United States House of Representatives 40. The explicit prescription for legislative action contained in Article I cannot be amended by legislation.

The Court's answer in *Chadha* is, of course, no answer at all. The Court merely asserts the unimpeachable (but irrelevant) proposition that a statute cannot alter the constitutional procedure for passing legislation. But the Court's argument assumes that legislation is necessary, whereas the issue under discussion is whether there was any alteration of existing legal rights so as to make legislation necessary. The point in *Atkins* is logically prior to the question of how legislation must be passed under the Constitution; it was that legislation was not necessary since there were no "rights" to alter.

The Court's opinion in *Chadha* does not turn solely on the Court's construction of Chadha's rights, however. The opinion can also be read to hold that the legislative veto is unconstitutional if it alters legal rights of any persons "including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch."⁶² The Court's reasoning is no less arbitrary and formalistic in discussing the "rights" of the Executive branch. The Court declares:⁶³

Disagreement with the Attorney General's decision on Chadha's deportation . . . no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determination of policy that Congress can implement only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

it conferred no legal rights until after the time for Congress to exercise its legislative veto had passed.

⁶¹ 103 S. Ct. at 2787, n.22.

⁶² 103 S. Ct. at 2784 (emphasis added). The Attorney General of the United States has adopted the broad reading of *Chadha*, see William French Smith, *Congress: No Loss in Ruling by Court*, NEW YORK TIMES, July 12, 1983, at A21. (Any congressional action "with the purpose and effect of altering the legal rights of people outside the legislative branch" must be enacted by both houses and presented to the President.)

⁶³ 103 S. Ct. at 2786.

The first sentence merely restates the Court's conclusion in different words. The question was whether Congress could affect policy through the legislative veto without passing a statute. It is no answer to say that the legislative veto affects policy, and therefore a statute is required.

As for the second proposition—that Congress must “abide” its delegation of authority to the Attorney General—one can only ask “Why?” Again, the question is whether the legislative veto is a permissible technique for controlling exercises of delegated authority. Not a word of the Court's opinion is spent explaining why it would be contrary to the framers' principles of constitutional design or otherwise legally suspect for Congress to retain supervision over exercises of power that it has delegated.⁶⁴

The absence of any other explanation suggests that the Court regards its conclusion as implicit in the very concept of delegation: once power has been delegated, it is beyond recall. But there is nothing inherently implausible about some powers being delegated while others are retained.

There may be sound reasons of constitutional significance to prohibit Congress from making partial delegations of power to the Executive, but the Court does not reach that level of analysis. Instead, the opinion rests on two legal fictions,⁶⁵ “altering legal rights” and “delegation.” The Court treats these abstractions as if they had independent and immutable existences, rather than recognizing them as constructs that serve purposes which should define their reach and measure.⁶⁶ This approach to deciding cases by manipulating formal legal concepts is a throwback to what Llewellyn called the Formal Style of conceptualistic judicial reasoning prevalent late in the nineteenth century.⁶⁷

⁶⁴ The Court's opinion does include a short discussion of “the purposes underlying the Presentment Clauses . . . and the bicameral requirement.” See 103 S. Ct. at 2781–84. After the obligatory bow to the records of the Constitutional Convention and *THE FEDERALIST*, however, the framers' purposes never figure in the Court's analysis of the issues, see also 103 S. Ct. at 2799 (White, J., dissenting: “I do not dispute the Court's truismatic [*sic*] exposition of these clauses”).

⁶⁵ Cf. MAINE, *ANCIENT LAW* 20–41 (Firth ed. 1963). The modern connotations of the term “fictions” should not mislead us to think that the concept applies only if judges are consciously dissembling. See *id.* at 29.

⁶⁶ Cf. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 462 (1899) (“different rights . . . stand on different grounds of policy. . . . [I]f you simply say all rights shall be [absolute], that is only a pontifical or imperial way of forbidding discussion . . .”).

⁶⁷ See LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 5–6 (1960).

3. *Expressio unius est exclusio alterius*. Decision by presumption and legal fiction would be bad enough, but the Court makes a third argument even weaker and more palpably unreasonable than the first two: "Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action."⁶⁸

The Court proceeds to list "four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto,"⁶⁹ and to concede in a footnote that in 1798 the Supreme Court created a fifth exception by holding that proposed constitutional amendments are not subject to the President's veto.⁷⁰ From the existence of these exceptions, the Court concludes:⁷¹ "Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms."

Here the Court is engaged in another example of the style of reasoning based on mechanical legal "rules" fashionable in the late nineteenth century. The principle of construction which the Court invokes was once in common use for construing contracts and deeds to land under the maxim *expressio unius est exclusio alterius*.⁷² While the maxim is occasionally still cited in cases today to buttress interpretations of contracts and certain types of statutes,⁷³ it is quite a different matter juristically to rely on *expressio unius* to interpret the Constitution. The Constitution is not a mere private contract.⁷⁴ The

⁶⁸ 103 S. Ct. at 2786.

⁶⁹ *Ibid.* The exceptions are: the House's power to initiate impeachments, Art. I, sec. 2, cl. 6; the Senate's power to try impeachments, Art. I, sec. 3, cl. 5; the Senate's power to approve Presidential appointments, Art. II, sec. 2, cl. 2; and the Senate's power to ratify treaties, Art. II, sec. 2, cl. 2.

⁷⁰ 103 S. Ct. at 2786 n.20, citing *Hollingsworth v. Virginia*, 3 Dall. 378 (1798).

⁷¹ 103 S. Ct. at 2786.

⁷² ("The expression of one thing is the exclusion of the other.") See BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 505 (2d ed. 1848); see also *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 22 (1898). It should be noted that Broom warned that "great caution [is] always requisite" in applying this maxim. BROOM at 506.

⁷³ See, e.g., *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). On other occasions, however, the Supreme Court has cautioned against using this ancient maxim to construe modern statutes. *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943).

⁷⁴ "A constitution, establishing a frame of government, declaring fundamental principles, and creating national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract." *The Legal Tender Cases*, 110 U.S. 421, 439 (1884).

Constitution was intended to set in motion a process of government that would adapt to changing conditions over generations, and consequently linguistic aids to ascertaining the intent of "the Draftsmen" should carry relatively little weight in interpreting the Constitution.

Moreover, even in its native sphere of private law, *expressio unius* is subject to significant qualifications, one of which should preclude using it here. *Expressio unius* is actually a principle of evidence, not substantive law: If a writing lists some members of a class specifically, a permissive inference may be drawn that other members of the same class were meant to be excluded or else it would have been natural to list them also.⁷⁵ The inference is only a weak one, however, and it is negated entirely if other circumstances show that the list of specifics was not intended to be exhaustive. In particular, if there is general language in addition to the enumeration of specifics, the inference suggested by *expressio unius* does not apply since the inclusion of the general language contradicts the premise that the drafters intended to include everything in the enumeration.⁷⁶

The Court's use of *expressio unius* in *Chadha* ignores this well-established limitation on the principle. Clearly the Constitution does not purport to specify all the ways in which Congress may exercise power, and hence the inference suggested by *expressio unius* is not applicable. Perhaps the strongest reason to conclude that the framers did not intend to include everything in the enumeration of specifics is the fact that, in John Marshall's phrase, "it is a *Constitution* we are expounding."⁷⁷ If the government established by the Constitution is to sustain itself, Congress, like the other branches, must be able to exercise not only those powers that are mentioned specifically in the text of the Constitution but also those that may be fairly implied from the overall structure that the Constitution establishes.

In the past, the Court has frequently recognized that the wording of the Constitution does not purport to enumerate Congress's powers exhaustively. Thus, even though neither power is mentioned specifically in the text of the Constitution, it has been held that Congress may approve amendments to the Constitution without

⁷⁵ See 3 CORBIN ON CONTRACTS: §552 at 203-06 (1960).

⁷⁶ Springer v. Philippine Islands, 277 U.S. 189, 206 (1928); Corbin, note 75 *supra*, §552 at 206.

⁷⁷ McCulloch v. Maryland, 4 Wheat. at 407 (1819).

presenting them to the President for veto, and that Congress may investigate and engage in other oversight activities without bicameral action or presentment.⁷⁸ Admittedly, neither of these recognized exceptions to the requirements of presentment and bicameral action is directly analogous to the legislative veto, but they do illustrate that there is a category of congressional powers not mentioned in the text in addition to the power to pass statutes. Hence it is clear that the text does not enumerate Congress's powers exhaustively, and that the Court's reliance on *expressio unius* is invalid.

The doctrine that powers may be implied as well as enumerated is so fundamental that it is probably inherent in the nature of any constitution, but in the case of our Constitution the doctrine of implied powers is also codified in the Necessary and Proper Clause.⁷⁹ The Necessary and Proper Clause is clear, textual evidence that the framers did not intend to enumerate every way in which Congress may exercise power, and hence its existence undermines the premise for invoking *expressio unius* for the same reasons that general language in a contract shows that a listing of specifics was not intended to be exhaustive.

The Court, however, dismisses the Necessary and Proper Clause with the statement that "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing" its authority rather than Congress's authority to regulate immigration *vel non*.⁸⁰ The Court is surely correct that Congress's power under the Necessary and Proper Clause is not limitless,⁸¹ but the Court's analysis overlooks a crucial logical distinction. The Necessary and Proper Clause would not immunize an exercise of power by Congress that was otherwise impermissible under the Constitution, but that is not the situation before the Court. On the contrary, the point is that the existence of the Necessary and Proper Clause undermines one of the premises for the Court's conclusion that the legislative veto is unconstitutional, not that the Necessary and Proper Clause redeems a practice which is unconstitutional for independent reasons.

A more sophisticated argument could be made against using the Necessary and Proper Clause to refute the Court's *expressio unius* rationale. It could be argued that the Necessary and Proper Clause is

⁷⁸ *McGrain v. Daugherty*, note 47 *supra*; see generally KIRST, note 47 *supra*.

⁷⁹ Art. I, sec. 8, cl. 18.

⁸⁰ 103 S. Ct. at 2779.

⁸¹ *Buckley v. Valeo*, 424 U.S. at 132; Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 483 (1976).

irrelevant because it only relates to the subjects on which Congress may "make laws," but it does not affect the procedures for making them.⁸² But this argument is also wide of the mark. Congress did "make laws" in accordance with the constitutional requirements of bicameral action and presentment when it passed the statutes creating legislative vetoes. As long as Congress's claim to a legislative veto is grounded on a statute, duly passed following constitutional procedures, the proper question is whether such a statute is within the range of subjects on which Congress is empowered to legislate. Any confusion on this point arises from the Court's insistence on framing the issue as whether "the Framers intended to authorize either House of Congress to act" without following proper procedures for legislating,⁸³ when in fact Congress has legislated in accordance with constitutional procedures when it passed the legislative veto statutes. The proper question should be whether legislative veto statutes are within the range of subjects on which the Constitution authorizes Congress to legislate. The Necessary and Proper Clause is surely germane to that inquiry.

In analyzing whether the Constitution gives Congress power to enact legislative veto statutes, it must be borne in mind that Congress's power to legislate under the Necessary and Proper Clause is not restricted to effectuating Congress's own enumerated powers. In addition, Congress may also legislate in aid of "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁸⁴ Consequently, the *Chadha* Court's conclusion that delegated lawmaking authority is an executive, not a legislative, function⁸⁵ actually supports Congress's authority to pass legislative veto statutes. Congress may base its legislation in an area on powers conferred by the Constitution on other branches of government. For example, Congress's power to modify maritime law is based on the grant of admiralty jurisdiction to the federal courts, not on any legislative power independently granted to Congress itself by the text of the Constitution.⁸⁶ If the authority to make "quasi-legislative" rules can be delegated to the Executive branch and

⁸² See 634 F.2d at 433.

⁸³ 103 S. Ct. at 2786.

⁸⁴ Art. I, sec. 8, cl. 18. See Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROB. 102 (Spring 1976).

⁸⁵ 103 S. Ct. at 2785 n.16.

⁸⁶ Art. III, sec. 2, cl. 1; *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934).

independent agencies, the Necessary and Proper Clause gives Congress a general power to “make laws” controlling the exercise of that authority.

This is not to say, of course, that the legislative veto is constitutional. Prohibitions elsewhere in the Constitution might preclude the legislative veto even though Congress has general authority to legislate to control delegated lawmaking by the Executive. But the Court never reaches that level of analysis, nor does it identify either the source or the nature of such prohibitions. Rather, the thrust of the Court’s *expressio unius* analysis is that Congress lacks power to create legislative vetoes because the legislative veto is not mentioned anywhere in the Constitution. That argument is clearly invalid. At least since *McCulloch v. Maryland*, it has been clear that powers are not necessarily denied to Congress merely because they are not enumerated specifically in the text.

It is hard to imagine why the Court deviates from a principle of our constitutional law as fundamental as the doctrine of implied powers in analyzing the legislative veto, but perhaps the explanation lies in the term “legislative veto” itself.⁸⁷ The name associated with a legal device can carry subtle but powerful implications for the ways that we think about it.⁸⁸ The text of the Constitution gives a veto over legislation to the President explicitly,⁸⁹ but it makes no mention of any similar “veto” for the Congress. By calling the device at issue in *Chadha* a “legislative veto,” we may unconsciously consign it to constitutionally suspect territory. The word itself creates a vague, unreasoning sense that if the framers had intended Congress to have a veto, they would have said so, just as they did for the President.

But the analogy buried inside the term legislative “veto” is an imperfect one. Unlike the President’s veto, most legislative “vetoes” do not create a check on a power that the Constitution confides in another branch; instead, the legislative “veto” usually checks only powers of delegated lawmaking that are themselves conferred by statute. There is nothing anomalous about using statutory sources to create a limitation on a power which is itself statutory in origin. Yet the associations of the term “veto” imply the opposite: To be valid a “veto”

⁸⁷ The term “legislative veto” was used first in Millett & Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 PUB. AD. REV. 176 (1941); see Schwartz, *The Legislative Veto and the Constitution: A Reexamination*, 46 GEO. WASH. L. REV. 351, 351 n.3 (1978).

⁸⁸ As Humpty Dumpty said (anticipating Wittgenstein), words sometimes become our masters, rather than we theirs, see CARROLL, *THE ANNOTATED ALICE* 269 (Gardner ed. 1960).

⁸⁹ Art. I, sec. 7.

must find its source in the Constitution, which creates the presidential "veto." One cannot know, of course, but the ultimate source for the Court's curious *expressio unius* rationale may be a misnomer buried so deep in conventional legal terminology that we are no longer attuned to its implications. Imagine that from the beginning the legal device at issue in *Chadha* had been called "the conditional delegation" rather than the legislative veto. Its constitutional pedigree might well be beyond question by now.

C. THE COURT'S DUBIOUS JURISPRUDENTIAL PREMISES

The legislative veto may well be unconstitutional. Many thoughtful people have concluded that it is, at least in some circumstances. But if the legislative veto is unconstitutional, it is not unconstitutional for the reasons stated in *Chadha*. Whatever one's view about the merits, the *Chadha* opinion is a disappointment.

The Court's analysis in *Chadha* is unpersuasive but also fails to come to grips with important issues raised by the legislative veto. Even an "apostle of strict construction" was taken aback by the literalism of the Court's opinion, writing that the Chief Justice "gave us strict construction with a vengeance."⁹⁰ Representative Elliott Levitas, a leading congressional supporter of the legislative veto, ventured a less charitable assessment: the Court's opinion was "not just simple" but "simplistic."⁹¹

The underlying source of the problems is jurisprudential. The Court insists that the texts of the presentment clauses and the vesting of legislative power in a bicameral Congress dispose of the legislative veto *ex proprio vigore*. But constitutional texts do not apply themselves.⁹² Justice White is surely right that the Constitution is silent on the "precise question" of the legislative veto and neither "directly authorize[s]" nor "prohibit[s]" it.⁹³ In order to treat the texts as dispositive, the Court must tacitly assume the postulate which should be under examination: whether the legislative veto is congressional

⁹⁰ Kilpatrick, *Decision Not Catastrophic after All*, NEW HAVEN REGISTER, July 8, 1983, at 9.

⁹¹ Levitas, *Letter to the Editor*, NEW YORK TIMES, July 7, 1983.

⁹² See Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063, 1090 (1981): "Like other formalist strategies, strict intentionalism pretends to constrain constitutional decisionmaking while inviting, if not demanding, arbitrary manipulation of sources and outcomes."

⁹³ 103 S. Ct. at 2798.

action of the sort to which the requirements of bicameralism and presentment should apply. To answer this question necessarily requires a perspective from outside the system: "Syllogism" alone is incapable of resolving such questions.

The Court's literal approach does not really exclude policy judgments about the legislative veto, as its adherents claim;⁹⁴ it only drives them underground, where it is more difficult to scrutinize and criticize them. It would be better if the Court were open and aboveboard about its conclusions concerning the pernicious effects of the legislative veto, rather than slipping hints into footnotes,⁹⁵ while insisting that the language of the Constitution is dispositive and that the utility of the legislative veto is not in question.

The second reason that the Court's approach in *Chadha* is unsatisfactory grows out of the first. The Court's linguistic arguments and analytical approach depend on dividing government power into three stark categories—legislative, executive, and judicial—and are troublesome because they are unpersuasive on their own terms.⁹⁶ But the Court's approach is also troubling because it excludes other considerations that should be relevant. It is as if the Court were determined to avoid acknowledging what the case is really about. Representative Levitas has charged:⁹⁷

The framers of our Constitution would be most surprised to find that regulations that have the force and effect of law are today put into effect by unelected officials in the executive branch and in independent agencies rather than by the Congress. Those "laws" are not passed by either the House and Senate, nor are they signed by the President. As this practice developed over the years, Congress

⁹⁴ See 103 S. Ct. at 2780-81 ("[The] wisdom [of the legislative veto] is not the concern of the courts; . . . JUSTICE WHITE undertakes to make a case for the proposition that the one-House veto is a useful 'political invention'. . . . But policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised").

⁹⁵ See 103 S. Ct. at 2771 n.3 (suggesting that "it is not at all clear" that the House "correctly understood the relationship between" the resolution it passed and *Chadha*'s deportation, but may have thought that it was confirming rather than overruling the Attorney General's decision).

⁹⁶ Only a few years ago the Court declared that the proper inquiry in separation of powers cases was not to be found in the "archaic view" of "three airtight departments of government" but rather by assessing the actual "impact" a measure would have on the functioning of other branches of government. *Nixon v. GSA*, 433 U.S. 425, 443 (1977); cf. *id.* at 504 (Burger, C.J., dissenting).

⁹⁷ Levitas, note 91 *supra*. See also SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 345 (1981) (describing increasing use of the legislative veto in the 1970s as one of the best indicators of the resurgence of Congress after decades of decline).

attempted to redress the balance with the legislative veto. The Court's opinion . . . failed to mention that it was a response to this evolving system.

Levitas has a valid point, although he overstates it. The Court does mention "lawmaking" by administrative agencies, but only in a footnote and only in the distorted context of answering a rhetorical question from one of the briefs: "Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?"⁹⁸ The answer, the Court responds in a footnote that would do Lewis Carroll proud, is that while administrative rulemaking may "resemble" lawmaking,⁹⁹ and while by statute agency rules do "prescribe law,"¹⁰⁰ agency rulemaking is not really "legislative" but only "quasi-legislative" "Executive action."¹⁰¹ Besides, the Court adds, the bicameral process is "not necessary" in the case of rulemaking by agencies because the courts are available to insure that "the will of Congress has been obeyed."¹⁰²

The Court makes short work of the argument by assigning administrative rulemaking to a different pigeonhole. But the exercise in semantics misses the point. The growth of the bureaucracy in the Executive branch and in agencies independent of presidential control is not of constitutional significance because it raises a nice point of classification that can be laid to rest once the Court decides whether the legal category "executive" or "legislative" is more appropriate. Concern exists because of the reality that most of the federal law affecting most of the people most of the time is not made through the bicameral legislative process that the Court's opinion enshrines, but by administrative decisionmakers, who are not elected and who are not, by and large, subject to either effective presidential or judicial control.¹⁰³

The growth of lawmaking power in a vast administrative bureaucracy may be seen as a threat to the essence of the constitutional principle of separation of powers. Madison (not Hamilton, as the Court mistakenly states)¹⁰⁴ summarized that fundamental constitutional principle in Federalist No. 51 as "contriving the interior structure of

⁹⁸ 103 S. Ct. at 2785 n.16 (quoting from brief for the House of Representatives).

⁹⁹ 103 S. Ct. at 2785 n.16.

¹⁰⁰ 5 U.S.C. §551(4) (1976).

¹⁰¹ 103 S. Ct. at 2785 n.16.

¹⁰² *Ibid.*

¹⁰³ BREYER, REGULATION AND ITS REFORM 1-3 (1982).

¹⁰⁴ 103 S. Ct. at 2783.

the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”¹⁰⁵ The “constant aim” of this strategy, Madison continues, “is to divide and arrange the several offices in such a manner as that each may be a check on the other.”¹⁰⁶ It is ironic that the Court in *Chadha*, in the name of the constitutional principles of checks and balances and separation of powers, ends up striking down one of the few existing checks on lawmaking by the bureaucracy.¹⁰⁷

II

It is not unusual for the Supreme Court to begin a foray into a new and unexplored area of constitutional law with a decision like *Chadha*. The Court’s first opinions in a strange area often are mechanical, literal, and admit of no exceptions. In the past the Court solemnly declared, for example, that manufacturing was not interstate commerce;¹⁰⁸ that a state could not regulate terms of employment;¹⁰⁹ that the First Amendment does not prevent government discharge of an employee for her beliefs.¹¹⁰ In each case, the Court propounded a flat rule based on abstract reasoning. Each decision appeared as absolute and unyielding as *Chadha* does now, and each did not last.

The Court’s early decisions in an area are often rigid and mechanical because when the Court first faces new issues, it analyzes them in terms of existing legal concepts which were refined in other contexts. As the law grows, its logic is tailored to the needs of new situations as experience demonstrates inadequacies in the existing approach. The judicial process works like the “anchoring and adjusting” heuristic; a possible solution is proposed, often one which is suggested by the structure of the problem, and then adjusted to fit new circumstances.¹¹¹

¹⁰⁵ THE FEDERALIST PAPERS, note 41 *supra*, at 355. See also Sharp, *The Classical American Doctrine of “The Separation of Powers,”* 2 U. CHI. L. REV. 385 (1935).

¹⁰⁶ THE FEDERALIST PAPERS, note 41 *supra*, at 356.

¹⁰⁷ See Karl, *Letter to the Editor, Rule-Making Powers: An American Dilemma*, NEW YORK TIMES, July 6, 1983, at A18, col. 3. See also Schwartz, *The “Legislative Veto”—Now That It’s Gone*, NEW YORK TIMES, June 30, 1983, at A19, col. 2; Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L. J. 367 (1977). But see Martin, note 32 *supra*, at 262-67 (rejecting arguments that the legislative veto “actually promotes the aims” of separation of powers doctrine).

¹⁰⁸ *United States v. E. C. Knight Co.*, 156 U.S. 1, 12 (1895).

¹⁰⁹ *Coppage v. Kansas*, 236 U.S. 1, 14 (1915).

¹¹⁰ *Adler v. Board of Education*, 342 U.S. 485, 492 (1952).

¹¹¹ See Tversky & Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 14-18 (Kahneman, Slovic, & Tversky eds.

Chadha is such an "anchor." It remains to be seen to what degree the legal system will "adjust" this initial result.

It is inherent in the nature of the judicial process that legal doctrines evolve through a process of what Eugene Rostow described as "back and fill, zig and zag".¹¹²

[N]o court has ever achieved perfection in its reasoning in its first, or indeed in its twentieth opinion on the same subject. . . . In the nature of law as a continuing process, constantly meeting the shocks of social change, and of changes in people's ideas of justice, this characteristic of law must be true, even for our greatest and most insightful judges. They grapple with a new problem, deal with it over and over again, as its dimensions change. They settle one case, and find themselves tormented by its unanticipated progeny. They back and fill, zig and zag, groping through the mist for a line of thought which will in the end satisfy their standards of craft and their vision of the policy of the community they must try to interpret. . . . There are cases that lead nowhere, stunted branches and healthy ones. . . . Yet the felt necessities of society have their impact, and the law emerges, gnarled, asymmetrical, but very much alive. . . .

Rostow's description is surely correct for those parts of the law where we can look back and see lines of cases developing over time. When courts confront the same or similar issues over and over again, they do explore, modify, refine, and develop the law. But Rostow gives only half the picture. The judicial process does not inevitably erode a decision like *Chadha*.¹¹³ Sometimes, perhaps most of the time, lawyers and the community at large accept the Court's initial decision as settling the law. Unfortunately, no one has come up with an entirely satisfactory explanation for why the community recognizes some Supreme Court opinions as precedents while others become stunted branches of the law.

Often it is not the Court but the community reaction which signals that a decision is unacceptable and initiates a new cycle of legal evolution.¹¹⁴ It is not so much the formal checks in the Constitution

1982). See also Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. (Jan. 1984); Ackerman, *The Structure of Subchapter C: An Anthropological Comment*, 87 YALE L. J. 436, 444-45 (1977).

¹¹² Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MT. L. REV. 123, 141-42 (1962).

¹¹³ But see LEVI, AN INTRODUCTION TO LEGAL REASONING 9 (1949).

¹¹⁴ See generally BICKEL, THE MORALITY OF CONSENT 110-11 (1975). But cf. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L. J. (forthcoming).

that select which of the Supreme Court's "anchor" decisions stand and which are "adjusted."¹¹⁵ Rather, a combination of criticism and the rhythm of litigation itself acts as an invisible hand leading the Court to reexamine decisions which have not been accepted by the community.

If the principles of law declared in an opinion are recognized as dispositive, the Court's statement of the law will stand, literally unchallenged.¹¹⁶ On the other hand, if people continue to litigate, and lawyers and courts continue to have doubts about how these cases should be resolved, the Supreme Court is eventually moved to reexamine its previous statement of the law. No decision, not even a unanimous decision of the Supreme Court, is a precedent on the day it is decided. It becomes a precedent if it is recognized and accepted as authoritative to resolve other controversies.¹¹⁷ The process of legal evolution which Rostow describes is brought into play only when a significant number of people do not accept existing statements of the law as ending controversy in the area.¹¹⁸

The question that remains for the legislative veto is how this court which sits in judgment on the judgments of the Supreme Court will respond to *Chadha*. It is easy to get so caught up in criticizing Supreme Court opinions that we lose sight of the fact that a poor opinion is not the same thing as a bad decision. The craft of writing opinions is important, because method may sometimes lead courts to decisions wiser than the individual judges who make them and because opinions may influence the community's reaction to a decision. But courts, no less than the rest of us, sometimes reach a right—or at least an acceptable—result for the wrong reasons.

Once the Court has spoken, as it has in *Chadha*, evaluation must move to a new level. It is less important now what the Court should

¹¹⁵ See also ELY, *DEMOCRACY AND DISTRUST* 46-47 (1980).

¹¹⁶ See Rubin, *Why Is the Common Law Efficient?* 6 J. LEGAL STUD. 51 (1977); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977). The Rubin-Priest thesis is couched in terms of selecting rules for relitigation and modification if they are not economically efficient. In principle, however, any values that are systematically held by the community could make themselves felt on the law through a similar mechanism, see Elliott, note 111 *supra*. Absolute unanimity is not required for a legal issue to remain settled, of course. It is usually enough to prevent an issue from being reexamined by the Supreme Court, for example, if the lower federal courts have no difficulty deciding the cases that follow based on existing legal principles.

¹¹⁷ Deutsch, *Law as Metaphor: A Structural Analysis of Legal Process*, 66 GEO. L. J. 1339, 1340 (1978). See also Eisenberg, *Private Ordering through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 649-53 (1976).

¹¹⁸ See JHERING, *THE STRUGGLE FOR LAW* (Lalor tr. 1879).

have done than how other parts of the total lawmaking system should respond to the Court's decision. In deciding whether to acquiesce in the Supreme Court's decision in *Chadha*, or to pursue variations of the legislative veto in the hope that the Court will eventually soften its statement of the law, the legislative veto must be viewed from a different perspective. The germane question is whether the legislative veto is too valuable a part of the evolving structure of government to be abandoned because of one Supreme Court decision, or whether we should get along without it.

A. EFFECTS OF THE LEGISLATIVE VETO

Although the literature debating the legal issues posed by the legislative veto is extensive, relatively little attention has been paid to how the veto actually works in practice.¹¹⁹ Legislative vetoes are not alike. They exist in different statutory and political environments, their purposes and effects differ. How well the legislative veto works under the immigration laws has little bearing on the device's utility under the War Powers Resolution,¹²⁰ where its function is quite different.¹²¹

1. *An effective check on the bureaucracy?* The arguments in favor of the legislative veto were summarized by Representative Elliott Levitas when introducing a bill to create a comprehensive legislative veto over agency rules.¹²² According to Levitas, the legislative veto "give[s] the public, through their elected representatives, an input into and a control over the rules which govern their lives."¹²³

If you ask the man on the street who makes the laws in this country, he would likely tell you that Congress does. But he would be wrong, because more edicts regulating his life are promulgated by unelected bureaucrats than are passed by the elected Congress.

Expanded use of the legislative veto, according to Representative Levitas, would "help cut down on bureaucratic red tape, reduce the

¹¹⁹ Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977) (case studies under five statutes providing legislative vetoes); see also CONGRESSIONAL RESEARCH SERVICE, *STUDIES ON THE LEGISLATIVE VETO*, 96th Cong., 2d Sess. (Comm. Print 1980) (historical studies of legislative vetoes in sixteen areas of law) (cited hereafter as *STUDIES*).

¹²⁰ Pub. L. No. 93-148, §5, 87 Stat. 555, 556-57 (1973), 50 U.S.C. §1544 (1976).

¹²¹ See Fisher, *A Political Context for Legislative Vetoes*, 93 POL. SCI. Q. 241 (1978); compare McClure, *Legislative Veto Provisions under the Immigration Laws*, in *STUDIES*, note 119 *supra*, at 378, with Nanes, *Legislative Vetoes: The War Powers Resolution*, *id.* at 579.

¹²² 129 CONG. REC. H931-34 (daily ed., March 8, 1983) (statement of Rep. Levitas).

¹²³ *Id.* at H931-32.

regulatory outpouring from Federal agencies, and make the rules that are adopted more reasonable."¹²⁴

Opponents of the legislative veto dispute the claim that it is an effective check on the bureaucracy. It is certainly true that Congress seldom actually invokes the legislative veto. Precise statistics are not available, but it seems clear that there are many more statutes creating legislative vetoes than there are instances in which the veto has actually been exercised. There have been a few well-publicized cases in which Congress used the legislative veto to reject major agency rules. In May 1982, for example, Congress used a two-house legislative veto to override an FTC rule requiring dealers to disclose known defects in used cars to potential customers.¹²⁵ In that instance, however, an ordinary statute, passed by both houses and subject to presidential veto, almost certainly would have been forthcoming to nullify the rule if the legislative veto had not been available. Well-organized, politically effective groups do not need the legislative veto to see to it that an agency rule is reversed by Congress if it imposes significant costs on them but the beneficiaries of the rule are diffuse and disorganized.¹²⁶

If the legislative veto is worth saving, it must be because it provides something distinctive that is not available through the ordinary, statutory process. Antonin Scalia has argued that the legislative veto achieves nothing of substance that could not be done at least as well through the ordinary legislative process, except to avoid the President's veto and the requirement of passage by the other house.¹²⁷ That is not entirely correct, nor are these small differences. Proponents of the legislative veto point out that the process of passing a statute to overrule agency actions is "cumbersome and time-consuming."¹²⁸ In contrast, a legislative veto is a resolution of disapproval which, because it has no substantive content, cannot be amended, either on the floor or in committee.¹²⁹ Moreover, the statutory time limits within which a legislative veto must be exercised impose a discipline on the legislative process which means that as a practical matter subcommittee hearings

¹²⁴ *Id.* at H932.

¹²⁵ 128 CONG. REC. S5402 (daily ed., May 18, 1982); 128 CONG. REC. H2883 (daily ed., May 26, 1982), *vetoing* 46 FED. REG. 41328-78 (1981).

¹²⁶ See generally Wilson, *Introduction*, in *THE POLITICS OF REGULATION* (Wilson ed. 1980); see also MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

¹²⁷ Scalia, note 37 *supra*, at 24. See also Martin, note 32 *supra*, at 288-90.

¹²⁸ Levitas, note 122 *supra*, at H933.

¹²⁹ See Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 456 (1977); Fisher, *Introduction*, in *STUDIES* at 1, 4; but *cf.* *Consumer Energy Council v. FERC*, 673 F.2d at 476 (Wilkey, J.).

are rarely held, and committee reports are almost never written to accompany legislative veto resolutions.

The legislative veto does involve a simplification of the legislative process, but what is gained in speed is lost in understanding. Stripped of hearings, reports, and committee deliberations, members of Congress have no way to reach informed, independent decisions about how to vote on legislative veto resolutions. Moreover, without subcommittee hearings and internal deliberation even members of the subcommittee directly involved become virtual prisoners of their staff. It is a mistake, therefore, to conceive of the legislative veto as action by Congress, or by a single house, in the same sense that passing a statute is action by Congress; statutes creating legislative vetoes in effect delegate power to review agency actions to the staff of a congressional subcommittee, at least in the first instance.¹³⁰ Agencies tend to enter into negotiations at an early stage to ensure that the agency's proposals will be acceptable, rather than run the risk of suffering a legislative veto later.¹³¹ Thus, a legislative veto may affect policy even though it has not been exercised, and, as at least one lower court has correctly held, the fact that the veto has not been exercised should not immunize a statute from challenge under *Chadha*.¹³²

The true significance of the legislative veto cannot be measured by the infrequency with which it has been used. The legislative veto creates the most effective kind of power, the kind that does not have to be used to be effective. It is no exaggeration to say that "the main benefit of the congressional veto is that it exists. Its very existence will sensitize the bureaucracy and make it more responsive."¹³³ The key question, however, is "more responsive" to what? The political calculus for a group potentially affected by agency action changes once a legislative veto enters the picture. No longer does effective political recourse involve waiting until after agency and court have ruled and then attempting to move a majority of 535 legislators to act. Instead, it becomes possible to influence policy before the agency acts by persuading a few key members of Congress and/or congressional staff members.

Many public interest lawyers oppose the legislative veto for this reason, contending that it would only increase the influence of

¹³⁰ See Levitas, note 122 *supra*, at H933.

¹³¹ See Bruff & Gellhorn, note 119 *supra*, at 1409-12.

¹³² "A retained one-house veto is unconstitutional even when not exercised." *EEOC v. Allstate Ins. Co.*, 52 U.S.L.W. 2152 (Sept. 20, 1983).

¹³³ Levitas, note 122 *supra*, at H933; see also BOLTON, note 8 *supra*, at 22-24.

industry and other "[w]ealthy, well-organized and experienced special interests."¹³⁴ Former Representative Robert Eckhardt has been quoted as saying that "[r]ather than increasing Congressional control" legislation to expand the legislative veto "would simply provide more business for the high-priced Washington lobbyist."¹³⁵

Which groups would actually gain in influence if the legislative veto moved debate over "administrative regulations and their ultimate decisions into the private arena of congressional offices"¹³⁶ is not self-evident. The dominance of subcommittee staff under legislative veto statutes might lead decisionmaking to be less "political" than when the ordinary statutory process is the only congressional mechanism available for overturning agency decisions. On the other hand, because the legislative veto poses a much more credible threat to the substance of agency decisions, it probably does tend to reduce agency independence and the degree to which decisions can be based on "expertise," and to increase the political component in agency decisions. As former FTC Chairman Michael Pertschuk points out, the legislative veto "invite[s] an affected industry to try its case in a political forum rather than go through the painstaking process of building a record and arguing its case on the merits."¹³⁷

The legislative veto affects the administrative process procedurally as well as substantively by opening up a new congressional arena in which to debate issues that are before agencies. In the congressional arena, however, procedural requirements which are intended to insure fairness and equality of access in the administrative process do not apply.¹³⁸ As a consequence, the procedural due process issues raised by the legislative veto can be substantial.¹³⁹ Even if it does not violate the Constitution, it certainly is problematic that the legislative veto creates an "appeal" from administrative decisions to a forum that typically listens to representations of fact *ex parte*, does not give all sides equal opportunities to be heard, does not explain its decisions, and from which there is no appeal. But the threat to the integrity of

¹³⁴ Green & Zwenig, *The Legislative Veto Is Bad Law*, NATION, Oct. 28, 1978, at 434 (Director and staff attorney of Nader-affiliated Congress Watch); McGowan, note 8 *supra*, at 1149.

¹³⁵ Eckhardt is quoted in Green & Zwenig, note 134 *supra*, at 434.

¹³⁶ Hearings before the Subcommittee on Administrative Law and Government Relations of the House Comm. on the Judiciary on H.R. 3658, H.R. 8231, and Related Bills, 94th Cong., 1st Sess. 257 (1975) (statement of Professor Walter Gellhorn).

¹³⁷ See Mulock, *Legislative Vetoes in Selected Regulatory Agencies*, in STUDIES, note 119 *supra*, 560, 569.

¹³⁸ See Bruff & Gellhorn, note 119 *supra*, at 1412-14.

¹³⁹ See Martin, note 32 *supra*, at 261 n.22; see also Javits & Klein, note 129 *supra*, at 466.

administrative procedures is more subtle as well. Agencies may be encouraged to avoid public rulemaking proceedings altogether, resorting to ad hoc methods of making policy to evade the legislative veto.¹⁴⁰ The real difference of opinion is not over the effects of the legislative veto, but whether it is a good idea to employ a mechanism that cuts through bureaucratic red tape, subverts administrative due process, and makes unelected bureaucrats more responsive to the people yet increases the power of special interests.¹⁴¹

2. *The effect on Congress.* A second set of objections, in its simplest form, is that the legislative veto encourages Congress to make broad delegations of power to administrative decisionmakers. Without the veto, the argument runs, Congress would be forced to write better (more detailed) statutes¹⁴² or even to return power to "the people."¹⁴³ A more sophisticated version of the thesis, put by Professor David Martin, is that the legislative veto gives Congress a means to "make a public show of addressing an important issue, while yet evading direct responsibility for the necessary affirmative choices."¹⁴⁴

Both versions of the argument depend, however, on the dubious premise that it is a bad thing for Congress to "avoid" deciding issues, at least those issues worth characterizing as "of an essentially political nature."¹⁴⁵ Professor Martin writes:¹⁴⁶

Broad delegations are not an inevitable affliction visited on Congress by some outside force. They are inevitable only in the sense that the courts are not currently disposed to employ the nondelegation doctrine to save Congress from the consequences. But Congress itself, provided it musters the political will, can curb its delegates through more precise standards that channel the exercise of delegated power.

¹⁴⁰ See Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies*, 24 WM. & MARY L. REV. 79, 91-92 (1982); see also Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy through an Exceptions Process*, DUKE L. J. (forthcoming).

¹⁴¹ See LANDIS, *THE ADMINISTRATIVE PROCESS* 77-78 (1938) (praising British techniques of "laying on the table" which is similar to legislative veto as providing regular and open way for individual legislators to influence administrative policy, whereas in U.S. legislators must use "other measures" to put pressure on administrators).

¹⁴² See BOLTON, note 8 *supra*, at 49-50; see also Martin, note 32 *supra*, at 289-93.

¹⁴³ See Scalia, note 37 *supra*, at 25.

¹⁴⁴ Martin, note 32 *supra*, at 273.

¹⁴⁵ Scalia, note 37 *supra*, at 26.

¹⁴⁶ Martin, note 32 *supra*, at 288.

Ironically, these arguments against the legislative veto can be traced back to an attitude common among lawyers today that romanticizes the role of statutes in the total lawmaking system.

Lawyers, aware of limits to the institutional competence of courts, are naturally attracted to the idea of "leaving" tough issues to the legislature. Most lawyers view legislatures through the eyes of judges. Under the doctrine of legislative supremacy, courts are supposed to act, with few exceptions, as if legislatures were omniscient when they have spoken within their purview. But this does not mean that legislatures are omniscient, or that they ought to decide as many issues as possible. The truth is that often the decision that Congress would have made is not as good as the one that was made by another lawmaking body to which Congress delegated power. Prevailing constitutional theory is, of course, that the legislature must make basic policy decisions to "canalize" administrative discretion "within banks that keep it from overflowing."¹⁴⁷ But it does not follow that the narrower the banks, the better the statute. On the contrary, there are instances in which it is clear that Congress erred by writing statutes which were too specific, and by deciding issues on political grounds that might better have been left to agency expertise.¹⁴⁸

At least sometimes it is a virtue, not a defect, that the legislative veto enables Congress to feel comfortable making a delegation when it is "unable or unwilling to delimit the precise boundaries of executive action."¹⁴⁹ The same considerations that counsel courts to avoid deciding issues which are not "ripe" often apply to Congress as well.

There is, of course, a balance between the over general and the over specific in writing statutes, but the dream of a perfect code remains an illusion, as it always has been. Those who condemn the legislative veto because it encourages Congress to delegate power without writing detailed standards are moved by too great a thirst for certainty in the law. Ambiguity is often valuable, even necessary in affairs of state. Consider the War Powers Resolution.¹⁵⁰ Suppose Congress were to write detailed standards into law as conditions on the President's use of force, and suppose further that a situation arose in which the President felt it necessary to disobey them. Only two things could

¹⁴⁷ *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

¹⁴⁸ See *ACKERMAN & HASSLER, CLEAN COAL/DIRTY AIR* 121-28 (1981).

¹⁴⁹ *Javits & Klein*, note 129 *supra*, at 456.

¹⁵⁰ Note 120 *supra*.

happen, and neither would be desirable. It could become clear, either by judicial decision or through acquiescence, that the President alone decides to use military force, or it could be decided that Congress, not the President, has exclusive power to act in this area. The thirst for certainty would have been satisfied, but the state of the law would not necessarily have been improved. We might well have been better off to preserve the Constitution that the framers gave us, which with studied ambiguity makes the President Commander-in-Chief and gives Congress the power to declare war and raise armies.¹⁵¹ One need not accept the extreme view that all separation of powers issues should be left to the ebb and flow of political forces¹⁵² to recognize that there are situations in which it is desirable for Congress and the Executive to share power, while preserving ambiguity as to the precise authority of each.

To the extent that the legislative veto permits Congress to make delegations that it would not otherwise make, and to the extent that the legislative veto is used judiciously or not at all, it may be a useful tool in some contexts for maintaining a healthy balance between executive and legislative authority.

B. ALTERNATIVES TO THE LEGISLATIVE VETO

A variety of alternatives to the legislative veto have been suggested and their advantages and disadvantages debated.¹⁵³ Substitutes suggested for the legislative veto range from full-scale statutory action by Congress to oversight by a committee, including: (1) direct statutory repeal of agency action;¹⁵⁴ (2) amendments limiting an agency's jurisdiction;¹⁵⁵ (3) appropriations riders restricting the use of funds for specified purposes;¹⁵⁶ (4) rewriting statutes to require that agency rules

¹⁵¹ A leading analysis of the historical record concludes that the original intention of the framers was to give Congress "at least a coordinate, and probably the dominant, role in initiating all but the most obviously defensive wars." Lofgren, *War-Making under the Constitution: The Original Understanding*, 81 YALE L. J. 672, 701 (1972). The suggestion in the text of this article is that Lofgren's first interpretation, "coordinate" authority, is the correct one.

¹⁵² See CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 260-379 (1980).

¹⁵³ Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 AD. L. REV. 667 (1980); Bruff & Gellhorn, note 119 *supra*, at 1420-23; see also Levinson, note 140 *supra*, at 96-111 (reviewing state systems); CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES, note 47 *supra*.

¹⁵⁴ Kaiser, note 153 *supra*, at 669-73.

¹⁵⁵ *Id.* at 673-87.

¹⁵⁶ *Id.* at 687-96. See also Martin, note 32 *supra*, at 274 n.61.

must be enacted affirmatively by Congress;¹⁵⁷ (5) statutory requirements for consultation among agencies;¹⁵⁸ (6) requirements for notification of Congress or of a committee before action is taken;¹⁵⁹ (7) committee reports;¹⁶⁰ and (8) to "stage an embarrassing oversight hearing."¹⁶¹ At the statutory end of the spectrum, the alternatives are generally effective when they are actually invoked, but suffer from the disadvantage that they require overcoming the massive institutional inertia of Congress, not to mention surviving the President's veto. At the other end of the spectrum, the substitutes that rely on committee action are, like the legislative veto, easier to effect but also less effective.

The single substitute that comes closest to duplicating the legislative veto is an appropriations rider—a condition prohibiting the agency from using funds for a particular purpose which is written into the legislation to appropriate funds. While technically voted by the Congress as a whole, as a practical matter a rider often can be added in committee. Action is generally required by the appropriations committee, however, rather than by the standing committee that has substantive jurisdiction.¹⁶² The appropriations bill to which the rider is attached is subject to the President's veto, but as a practical matter, a veto is unlikely. As it has become increasingly difficult for Congress to agree on a budget in recent years, however, it has also become more difficult to use the appropriations process as a means of controlling agency action. Even if it is possible to get a rider adopted, there is no guarantee that it will be effective. If an agency receives funding under more than one appropriation, as many do, the Executive branch retains some power to evade the effect of a rider by "re-programming" unrestricted funds and using them to pursue the policy which had incurred Congress's ire.¹⁶³ And even if the rider is effective, its effect is only temporary, since a rider only lasts as long as the appropriations authority to which it is attached, usually only a single fiscal year.

None of the alternatives is an exact substitute for the legislative veto, but from among the total array of techniques available, one or another can usually be found that is tolerably serviceable if Congress is

¹⁵⁷ See Lewis, note 60 *supra*.

¹⁵⁸ Kaiser, note 153 *supra*, at 696-701.

¹⁵⁹ *Id.* at 701-04.

¹⁶⁰ *Id.* at 704-09.

¹⁶¹ Bruff & Gellhorn, note 119 *supra*, at 1423.

¹⁶² See generally Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. LEGIS. 413, 416-17 (1977).

¹⁶³ See Kaiser, note 153 *supra*, at 689.

determined to overturn agency or Executive action.¹⁶⁴ The real significance of the legislative veto, however, is found less in the instances in which it is invoked than in the way that its existence alters the working relationship between agency and subcommittee staff. Here too the divergence between the legislative veto and the alternatives is greatest. None of the suggested substitutes is nearly as certain or predictable as the legislative veto, and none so clearly gives the committee with substantive jurisdiction (as opposed to the appropriations committee) and its staff the primary say over an agency's proposals.¹⁶⁵ The threat of congressional review by means other than legislative veto is less likely to produce the advance negotiations between agencies and congressional committee staffs that are the hallmark of legislative vetoes.

This is not necessarily a great loss, however. Only the most extreme partisan of Congress could think that congressional staff are the best body imaginable to exercise essentially unreviewable power over Executive and agency decisionmaking. To be sure, some of the problems that accompany the legislative veto would also result from any other reviewing institution; for example, extra costs and delay would result from any additional level of review of agency decisions. But most of the problems which accompany the legislative veto are not inherent in the concept of creating an additional mechanism to review agency decisions. They result from using congressional staff to perform the reviewing function. If one broadens the focus, so that substitutes for the legislative veto may include mechanisms outside Congress, a number of alternatives to the legislative veto are attractive.

Most states provide a mechanism, in addition to judicial review and statutory amendment, for overriding agency rules.¹⁶⁶ State mechanisms for reviewing agency rules take a number of different forms, including one- and two-house legislative vetoes. In addition to those with legislative vetoes, however, nine states allow a legislative committee to suspend a rule temporarily pending final legislative action; at least

¹⁶⁴ See also Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. (forthcoming).

¹⁶⁵ For an account of authorization and appropriations committees as competing "subsystems" and an interpretation of the legislative veto as an attempt by authorization committees to increase their own authority, see DODD & SCHOTT, *CONGRESS AND THE ADMINISTRATIVE STATE* 222-24, 233-34 (1979).

¹⁶⁶ Levinson, note 140 *supra*, at 81-83; NATIONAL CONFERENCE OF STATE LEGISLATURES, *RESTORING THE BALANCE: LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS* (1977).

fifteen states have advisory committees that systematically review administrative rules and make recommendations to the legislature concerning those that should be set aside; and in another three states, the advisory committee not only recommends which rules should be set aside, but if it finds a rule objectionable, the burden of proof shifts against the agency on judicial review. This last approach, an advisory committee recommendation that shifts the burden of proof, is also recommended in the latest revision of the Model State Administrative Procedure Act.¹⁶⁷

Direct review of administrative rules by legislatures has been challenged on separation of powers grounds in several states,¹⁶⁸ and the challenges are likely to intensify after *Chadha*.¹⁶⁹ An independent commission to review administrative rules is, however, an attractive alternative to the legislative veto at the federal level. A new body could be created by Congress with authority to review and suspend exercises of delegated lawmaking authority, or even to set them aside entirely. If Congress may delegate power to make rules, presumably it may provide by statute that the rules do not become effective unless they are approved by an administrative review commission. An administrative review commission could act as a check on arbitrary or unwise uses of administrative authority at least as well as the legislative veto, thus meeting one of the primary objectives claimed by supporters of the legislative veto. On the other hand, because the administrative review commission would be outside Congress, the procedural and substantive problems raised by the legislative veto would be ameliorated. It is possible that Congress could make appointments to some forms of an administrative review commission, but the Constitution would require that appointments to others be made by the President.¹⁷⁰

¹⁶⁷ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL STATE ADMIN. PROCEDURE ACT §3-204(d) (rev. 1981).

¹⁶⁸ Levinson, note 140 *supra*, at 83 nn.17-21.

¹⁶⁹ Peterson, *Court's Outlawing Of Congress's Veto Casts Shadows on State Legislatures*, NEW YORK TIMES, July 22, 1983, at A8, cols. 1-3.

¹⁷⁰ The course least vulnerable to challenge would be an independent commission insulated by statute from both Congress and the President, whose members would be nominated by the President and confirmed by the Senate. The configuration most vulnerable to challenge would be to give the power to suspend rules to a commission composed of members of Congress *ex officio*. See Art. I, sec. 6, cl. 2. Between the two, in a debatable area, lies a commission some or all of whose members would be appointed by Congress. See *Buckley v. Valeo*, 424 U.S. 1, 109-43 (1976). The Court did recognize exceptions to the requirement of presidential appointment, however. If the rulemaking review commission's role were limited to investigating and recommending to Congress which rules be set aside by statute—and perhaps even if the commission were given power to suspend rules temporarily, or to affect the burden of proof on judicial review—Congress might well be able to appoint its members. 424 U.S. at 141.

It may seem odd that Congress can create a commission to do what Congress cannot do itself,¹⁷¹ but the parts of the Constitution relied on by the Court in *Chadha* are limitations on Congress, not on the instrumentalities that Congress may create. The Constitution does not require that the commission's action (as opposed to Congress's) must be presented to the President for his or her veto. An administrative review commission would not infringe on the judiciary's power, as long as an ultimate right of appeal to the courts is preserved,¹⁷² nor would an administrative review commission be performing a judicial function. The commission's role would be to second-guess agencies on discretionary decisions within the ambit of their authority, a function which the courts steadfastly disclaim for themselves.¹⁷³

C. THE LEGISLATIVE VETO IN PERSPECTIVE

Legislative veto statutes range along a spectrum. On one end is the public law, represented by the War Powers Resolution or the Congressional Budget and Impoundment Control Act of 1974. In these instances, Congress has used the legislative veto to control affirmative exercises of power by the Executive. By and large, the powers at issue have not been delegated by Congress, but are powers that the President claims as inherent, a claim that Congress generally disputes. In some instances, judicial review is not available to resolve the controversy, in others it may not be desirable to resolve the issue in the courts.¹⁷⁴ The need for the legislative veto here may be greatest. Substitutes for legislative vetoes of this kind are not easy to imagine. Those that exist lack one of the virtues of the legislative veto statute: Congress can call into question the President's assertion of unilateral power without actually having to do anything. Viewed from this perspective, the War Powers Resolution may be a success after all.¹⁷⁵

At the other end of the spectrum, the private law end, are the legislative veto statutes in which the public law implications are much more attenuated, but the interests of individuals in fair treatment are more pronounced. Immigration cases like *Chadha* are at this end of the spectrum.

¹⁷¹ See 103 S. Ct. at 2803 (White, J., dissenting).

¹⁷² Cf. *Johnson v. Robison*, 415 U.S. 361 (1974).

¹⁷³ See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 557-58 (1978).

¹⁷⁴ See generally Casper, note 81 *supra*; see also Choper, note 152 *supra*.

¹⁷⁵ But cf. Nanes, *Legislative Vetoes: The War Powers Resolution*, in *STUDIES*, at 579, 602.

At the private law end of the spectrum, no unique need for the legislative veto is apparent. If Congress regards the Executive's practices in granting suspensions of deportation to aliens as too lenient, it has a variety of effective techniques available for sending signals to the INS. To be sure, most other techniques are prospective only, and in the meantime a number of decisions that Congress regards as erroneous may stand, but that may not be an unacceptable price. On the other hand, the problems that the legislative veto raises are most intense at the private law end of the spectrum. Even if not ultimately a violation of the Due Process Clause, the lack of equal treatment and fair and regular procedures accompanying the legislative veto are most bothersome here, as are the opportunities for special influence, be it political or financial.

Between the two poles lie a range of situations in which the public and private dimensions are intermingled in varying degrees: FTC rules defining unfair trade practices¹⁷⁶ and EPA rules concerning hazardous wastes¹⁷⁷ are two examples which lie somewhere in the middle. Here too there are plenty of substitutes for the legislative veto, although none is its exact equivalent. In the middle range, a balance is called for. Generally the benefits are speculative and are not worth the costs in arbitrariness, both procedural and substantive. Congress and the President, which together may create a statutory scheme for delegated lawmaking, ought, however, to have discretion to choose that politics play a larger role in regulating unfair trade practices than in cleaning up hazardous waste disposal sites or vice versa. To pick the right mix of politics and expertise to be built into delegated lawmaking is a prototypical political question of the sort that ought to be left to Congress and the President, not put out of their reach by the Court.

Chadha, of course, would not leave such choices to the political branches, but strikes down the legislative veto all along the spectrum. *Chadha* is not a disaster, however. In most areas, passable substitutes are available for the legislative veto. It is unlikely, consequently, that community reaction will lead to major "adjustment" of the "anchor" staked out by the Court in *Chadha*. In the few areas where the legislative veto is uniquely valuable (such as the War Powers Resolution), opportunities for litigation are few and far between, and it is unlikely that the judicial process will be able to correct itself by carving out exceptions through the "ebb and flow" of cases about

¹⁷⁶ 15 U.S.C. §57a-1.

¹⁷⁷ 42 U.S.C. §9655.

which Rostow wrote.¹⁷⁸ Perhaps under a torrent of criticism the Court would pull back. Perhaps even a consensus among scholars that *Chadha* does not reach the public law end of the spectrum would suffice to keep the legislative veto alive under the War Powers Resolution by keeping the issue open. But neither seems likely.

Chadha has probably stated the law for some time to come.

III

From one perspective, writing a broad, all-encompassing opinion in *Chadha* may have been a wise exercise of judicial statesmanship. Sometimes the Supreme Court can unlock latent, creative forces by eliminating weak or deficient parts of the existing legal order, thereby clearing room for new growth.¹⁷⁹

In statutes, as elsewhere, new concepts are slow to emerge if an existing device is available to fill a need. Occasionally accidents or circumstances do give birth to a new device such as the legislative veto. If it meets a need that no existing device satisfies, there is a strong tendency for the "mutant" to reproduce rapidly as it is copied from one statute to another. Without competitors or obvious countervailing considerations to limit its growth, such a new legal device may spread rapidly until it becomes so established that it dominates the field and squeezes out the possibility of alternatives. The geometric growth of recent statutes incorporating legislative vetoes is evidence that this phenomenon has been occurring. Congress has been writing legislative vetoes into statutes where the need for the veto is weak at best.¹⁸⁰ Moreover, as the legislative veto has become fashionable, Congress has not been inclined to give serious consideration to possible alternatives for controlling administrative discretion under broad delegations.

Paradoxically, then, by striking down the legislative veto, in the long run the Court may have advanced the professed goals of supporters of the legislative veto to control administrative discretion.

¹⁷⁸ See note 112 *supra*.

¹⁷⁹ Cf. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 8-15 (1982).

¹⁸⁰ Examples include a legislative veto over President's extension of production period for Naval petroleum reserves, Pub. L. No. 94-258, 90 Stat. 303 §201(3), (1976); a veto over rules establishing grievance procedures for institutionalized persons, §7(b)(1), Pub. L. No. 96-247, 94 Stat. 349, 352-55 (1980); a veto over changes to the rules governing airline pension plans, §43(f)(3), Pub. L. No. 95-504, 92 Stat. 1705, 1752 (1979), or to retirement plans for employees of the District of Columbia, §164, Pub. L. No. 96-122, 93 Stat. 866, 891-92 (1979).

Deprived of the legislative veto, Congress may now be forced to consider alternative devices.

The idea that *Chadha* may advance the cause of controlling administrative discretion, however, is only speculation. There is no cause for rejoicing when the Court strikes down a legal device that it assumes is "efficient, convenient and useful in facilitating the functions of government."¹⁸¹ To be sure, there may be a difference between good policy and what the Constitution requires. One of the things "unconstitutional" means is that something violates principles so fundamental that no other considerations may save it. It is, however, no virtue in a constitutional law that it lays to waste political innovations which are efficient, convenient, and useful (as the Court says it assumes the legislative veto to be).

A. TOWARD AN ALTERNATIVE APPROACH

A starting point for an alternative approach to the issues in *Chadha* can be found in Justice White's dissent. There are two distinct levels to the dissent. White answers the majority's formalistic, textual arguments with a conceptual argument of his own. The legislative veto is not the equivalent of a statute, White argues, because Congress has "reserv[ed]" a veto in the delegation and hence the veto does not make a change in the "legal status quo."¹⁸² White supports his view that a condition built into a statute is not an independent exercise of legislative authority with two cases from the late 1930s which had upheld statutes giving "vetoes" to private groups.¹⁸³ If this were all there were to White's opinion, it would be little better than the majority's equally mechanical approach.

White's dissent, however, operates on a second level as well. He sees the legislative veto in a larger perspective of evolving constitutional structure and relationships.¹⁸⁴ White begins by tracing the history of the legislative veto, concluding that "it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches" but a "reservation of ultimate authority necessary if

¹⁸¹ 103 S. Ct. at 2780-81.

¹⁸² *Id.* at 2806-07.

¹⁸³ *Currin v. Wallace*, 306 U.S. 1 (1939); and *U.S. v. Rock Royal Co-operative*, 307 U.S. 533, 577 (1939), cited 103 S. Ct. at 2803 (White, J., dissenting). But cf. Martin, note 32 *supra*, at 297-98 (distinguishing *Currin* on ground that requirements of presentation and bicameral action apply "only to members of Congress").

¹⁸⁴ Cf. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

Congress is to fulfill its designated role under Article I as the nation's lawmaker."¹⁸⁵ White then describes the growth of the "modern administrative state" in which "legislative authority is routinely delegated to the Executive branch, to the independent regulatory agencies and to private individuals and groups."¹⁸⁶ Quoting Justice Jackson, White asserts that the rise of the administrative state has been "the most significant legal trend of the last century."¹⁸⁷ A plethora of administrative bodies with lawmaking authority has now "become a veritable fourth branch of Government, which has deranged our three-branch legal theories."¹⁸⁸

White criticizes the majority for not "facing the reality of administrative lawmaking,"¹⁸⁹ but what significance White himself ascribes to administrative lawmaking is a bit murky. He suggests that the "wisdom and the constitutionality of these broad delegations [to administrative lawmakers] are matters that still have not been put to rest."¹⁹⁰ White turns around, however, and argues in a key passage that "If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative powers for itself."¹⁹¹ Strictly speaking, White's point is a non sequitur: The fact that Congress may delegate legislative authority, without more, has nothing to do with whether Congress may reserve a legislative veto in the delegation. White comes back to the supposed inconsistency between the result in *Chadha* and the growth of administrative lawmaking at the conclusion of his opinion: "[The Court's holding] reflects a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state."¹⁹² It is clear that Justice White considers the growth of the "modern administrative state" to be relevant, but just exactly how it bears on the questions before the Court he never explains.

White indicates that he would not necessarily hold all legislative vetoes constitutional.¹⁹³ Instead of the majority's approach that the texts of Article I are dispositive, White contends that the "Constitution does

¹⁸⁵ 103 S. Ct. at 2796.

¹⁸⁶ *Id.* at 2801.

¹⁸⁷ *Id.*, quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

¹⁸⁸ *Ibid.*

¹⁸⁹ 103 S. Ct. at 2803.

¹⁹⁰ *Id.* at 2802.

¹⁹¹ *Ibid.*

¹⁹² *Id.* at 2810.

¹⁹³ *Ibid.*

not directly authorize or prohibit the legislative veto,” and that in the face of the “silence of the Constitution on the precise question,” the Court should “determine whether the legislative veto is consistent with the purposes of Art. I and the principles of Separation of Powers.”¹⁹⁴ Justice White would analyze each legislative veto in its individual context. It turns out, however, that White’s general “constitutional principle of separation of powers”¹⁹⁵ has very little content. Measures would violate the separation of powers principle only if they were contrary to “some express provision in the Constitution” assigning authority to another branch,¹⁹⁶ or if they “prevent” another branch “from accomplishing its constitutionally assigned functions.”¹⁹⁷ Most legislative vetoes would easily survive these tests, although Justice White maintains that “a legislative check on an inherently executive function, for example that of initiating prosecutions, [would pose] an entirely different question.”¹⁹⁸

There is obvious appeal to White’s approach as contrasted with the majority’s literalism, but several important weaknesses are apparent. For one thing, the textual basis for a general separation of powers principle is unclear, a factor to which the majority alludes in explaining its own refusal to follow this line of analysis. The separation of powers principle that Justice White describes has little if any independent content beyond what is already expressed or implied by other provisions of the Constitution. White’s approach would, moreover, call into question those exercises of the legislative veto at the public law end of the spectrum, where the legislative veto is arguably most valuable, while doing nothing to remedy the abuses of the legislative veto in the private law area, where it seems least fitted to its task.

The weaknesses in his approach are even deeper and more fundamental. White’s opinion fails to persuade at least in part because both the concept of the “administrative state” and the jurisprudential underpinnings that make it relevant to the issue before the Court remain unclear. Nonetheless there is great intuitive appeal to Justice White’s recognition that the federal government “has become an endeavor far beyond the contemplation of the Framers,” and that the

¹⁹⁴ *Id.* at 2798.

¹⁹⁵ *Id.* at 2808.

¹⁹⁶ *Id.* at 2809.

¹⁹⁷ *Id.*, quoting *Nixon v. GSA*, 433 U.S. 425, 433 (1977).

¹⁹⁸ *Id.* at 2810.

Constitution must be interpreted "with the flexibility to respond to contemporary needs."¹⁹⁹

B. THE PROBLEM OF QUASI-CONSTITUTIONAL INSTITUTIONS

Underlying the debate between White and the majority is a problem with ramifications that go far beyond the legislative veto. In a nutshell, the problem is that the text of the Constitution creates not four branches of government, but three. White and the majority differ both conceptually and jurisprudentially over the significance of the changes in the structure of the federal government which have occurred since the New Deal. White conceives of these changes as creating the "modern administrative state." The majority, on the other hand, sees them as merely a series of delegations to the Executive,²⁰⁰ a phenomenon that goes back to the beginning of the Republic.

White's term, "the modern administrative state," is used with "increasing regularity" by contemporary political scientists,²⁰¹ but is only beginning to achieve currency among lawyers.²⁰² The concept of an "administrative state" goes well beyond the idea of delegation of lawmaking power to administrative decisionmakers. Indeed, the concept of an "administrative state" goes even further than the metaphor of a Fourth Branch. Describing administrative lawmakers as a "Fourth Branch" implies that they have achieved parity with the three original branches of government. The "administrative state," on the other hand, suggests that the growth of administrative decision-making is significant, not only in its own right, but also because administrative lawmaking has become the central lawmaking institution, and thereby that it has transformed the functions and relationships among other institutions of government. The term "the modern administrative state" implies, in short, that a qualitative change in the nature of government as a whole has resulted from the growth of administrative lawmaking.

To spell out the implications of Justice White's term is not to endorse it. Lumping a number of institutional changes together under the rubric of "the administrative state" substitutes a slogan for more precise analysis of particular institutions. In at least one crucial respect,

¹⁹⁹ *Id.* at 2798.

²⁰⁰ See 103 S. Ct. at 2785 n.16.

²⁰¹ FREEMAN, *CRISIS AND LEGITIMACY* 3 (1978); see also DODD & SCHOTT, note 165 *supra*.

²⁰² See Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

however, White's metaphor is more perspicacious than the familiar concept of delegation which the majority employs. Delegation is a mechanistic metaphor: it implies that the thing which is delegated is the same in the hands of the recipient as it was before, and that both parties are otherwise left unchanged by the transaction. The "administrative state," on the other hand, suggests a concept of government as a holistic system. Changing one part of such a system necessarily alters the whole.

In this respect, at least, White's understanding of the significance of the rise of administrative lawmaking is superior to the majority's. The growth of a vast administrative bureaucracy with lawmaking powers is not a mere additive change to the structure of government. Inevitably it has transformed the nature and functions of existing institutions as well. The increasing importance of administrative modes of lawmaking has, for example, transformed the role of the courts in many areas of law. Rather than make common-law tort rules, for example, today federal courts are more likely to review generic rulemaking by agencies such as the National Highway Transportation Safety Administration. No longer are the courts the primary expositors of the law as they were in the nineteenth century. Instead, they review law made by others.²⁰³ Federal courts have become part of a composite lawmaking system, in which they function in conjunction with legislatures and administrative decisionmakers so that the law is the joint product of all three.

Similarly, the rise of a vast administrative bureaucracy with lawmaking powers has transformed the role of Congress. For one thing, it has stimulated the growth of congressional staff and ancillary institutions, but even more importantly it has altered the nature of federal legislation itself. Most significant legislation passed by Congress today is not addressed to the citizenry, but to supposedly expert administrative decisionmakers, who in turn formulate the level of rules that touch the populace.

Justice White and the majority differ not only in how they conceive of the changes in the structure of government since the New Deal, but also in the jurisprudential significance that they ascribe to them. White senses that "the most significant legal trend of the last century" must somehow alter existing constitutional relationships. It is downright

²⁰³ *Ibid.*

silly, White maintains, to read the language of the Constitution concerning the legislative process in isolation, without taking into account massive changes that have taken place in other lawmaking institutions. White gropes for a recognized legal doctrine that will legitimize the idea that a change in institutions of a magnitude as fundamental as the growth of the "modern administrative state" should alter the meaning and relationships among existing provisions of the Constitution. White never finds it, and perhaps no such doctrine now exists in American constitutional law. The majority dismisses White's point, characterizing it as a mere "utilitarian argument" that the legislative veto is a "useful 'political invention'."²⁰⁴ According to the majority, the growth of the administrative state and the concomitant need to control it are mere "policy arguments," which do not rise to the level of constitutional significance.

Perhaps the majority's answer suffices for a case like *Chadha*, since reasonable substitutes for the legislative veto are available. The difference between White and the majority in *Chadha* is, however, symptomatic of a deeper confusion in our law over the constitutional status and significance of lawmaking by administrative bodies, a confusion that could cause great harm if it is not resolved. Because existing constitutional doctrines were made to accommodate three branches of government, not four, it is the lawyer's equivalent of child's play to raise questions about the "uneasy constitutional position of the administrative agency,"²⁰⁵ or to yearn for the day when the courts will invoke the nondelegation doctrine to return us to a simpler era in which Congress made the laws, as the framers intended.²⁰⁶

Ultimately, what White is up against in *Chadha* is the problem created by the growth of "quasi-constitutional" institutions. The dimensions of the problem can be clarified by referring to an article written several years ago by Kenneth Dam describing the "American Fiscal Constitution."²⁰⁷ Dam began by noting that "the notion of an American Fiscal Constitution may strike most American constitutional lawyers as odd," since the Constitution itself has comparatively little to say about financial matters.²⁰⁸ Adapting the concept of "framework

²⁰⁴ 103 S. Ct. at 2781.

²⁰⁵ BREYER & STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 37-39 (1979).

²⁰⁶ See McGowan, note 8 *supra*, at 1128-30; but see Easterbrook, note 3 *supra*, at 118-19: "The nondelegation doctrine is a name without a doctrine."

²⁰⁷ Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977).

²⁰⁸ *Id.* at 271.

statutes" proposed originally by Gerhard Casper,²⁰⁹ Dam suggested that the American Fiscal Constitution could be understood as extending beyond the test of the Constitution itself.²¹⁰

Supplementing the rules of taxation and expenditure found in the Constitution are several statutes that are so far-reaching in their implications for year-by-year fiscal decisions that they deserve to be thought of as quasi-constitutional. . . . American constitutional law does not have a separate category to describe these "framework" statutes, though they are increasing in importance. Although such statutes can be amended under the same congressional majority rule as any other statute and must comply with the Constitution, it would be a triumph of form over substance to treat them as ordinary legislation.

In addition to the "framework statutes" defining the budgetary process, the American Fiscal Constitution includes certain customary rules including the "widespread consensus in American society about the respective roles of the federal, state and local governments."²¹¹ Taken together "this evolving structure is at least as important as the provisions of the Constitution, and perhaps can be described as the constitution (with a lower-case 'c') underlying the process of public choice" in the fiscal area.²¹² Although never quite put into these words, the central idea of a fiscal constitution is the insight that one core function of a constitution—creating the basic institutions of government and defining power relationships among them—is being performed for fiscal matters in the United States by legal structures that are not part of the Constitution.²¹³

The United States has at least one other "constitution (with a lower-case 'c')," which we might call the "constitution of the administrative state." Its functions are to provide structure and control over the enormous array of federal departments, independent commissions, agencies, government corporations, banks, boards, committees, and quasi-official agencies and authorities that now

²⁰⁹ Casper, note 81 *supra*, at 482.

²¹⁰ Dam, note 207 *supra*, at 272-73. Dam mentions the War Powers Resolution as an example of another "framework" statute. *Id.* at 271 n.6.

²¹¹ *Id.* at 273.

²¹² *Id.* at 273-74.

²¹³ The German Constitution (*Grundgesetz*, or Basic Law) defines fiscal relationships in much greater detail than in the United States, "giving fiscal federalism in the Federal Republic a constitutional explicitness and structure almost totally lacking in the United States." *Id.* at 294.

exercise power to make law in various forms.²¹⁴ This network of legal principles, usually thought of as part of administrative law, includes "framework" statutes such as the Administrative Procedure Act,²¹⁵ the Freedom of Information Act,²¹⁶ the Federal Advisory Committee Act,²¹⁷ the common law of judicial review of administrative action, even Executive Orders²¹⁸ and unwritten rules concerning informal interagency consultation. Together the constitution of the administrative state creates a system of law by which government instrumentalities are supposedly controlled and managed.²¹⁹

American lawyers do not yet have terms and concepts to enable them comfortably to handle bodies of law of this sort.²²⁰ The word "quasi-constitutional"²²¹ has been suggested by some to describe such law,²²² but it is awkward. Moreover, it carries the unfortunate implication that this law is not really of constitutional stature.²²³ The truth is that quasi-constitutional law has some, but not all, of the characteristics of constitutional law.

Quasi-constitutional law is unlike formally amending the text of the Constitution. A lowercase constitution can be modified more easily as conditions change, or, more to the point, as experiments with different approaches for controlling administrative discretion are tried one after another until one works.²²⁴ At the moment the law is in the midst of a major exercise in revising the constitution of the administrative state. At issue is how to extend the Constitution's system of checks and balances to the array of lawmaking institutions exercising delegated powers. Another generation of administrative lawyers, led by Louis

²¹⁴ Over 600 pages are required simply to catalog them, see THE UNITED STATES GOVERNMENT MANUAL 1982-83.

²¹⁵ 5 U.S.C. §551 *et seq.* (1976).

²¹⁶ 5 U.S.C. §552 (1976).

²¹⁷ 5 U.S.C. App. I (Supp. I, 1977).

²¹⁸ See, e.g., Executive Order No. 12291, 46 FED. REG. 13193 (Feb. 19, 1981).

²¹⁹ See BREYER & STEWART, note 205 *supra*, at 10-11 (1979); DAVIS, ADMINISTRATIVE LAW TEXT §1.01 at 1 (3d ed. 1972).

²²⁰ Elsewhere I have used the term "meta-law" to describe law of this kind, Elliott, *Holmes and Evolution*, note 111 *supra* (1984); Elliott, *The Disintegration of Administrative Law*, 92 YALE L. J. (1983) (forthcoming).

²²¹ Dam, note 207 *supra*, at 272.

²²² See Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 740 (1977); GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 429 (9th ed. 1975).

²²³ Dam himself later abandons the term; see Dam, note 207 *supra*, at 278 (referring to "framework" statutes as "part of the Fiscal Constitution in its larger sense").

²²⁴ See BREYER, note 103 *supra*, at 3; see also Shapiro, *On Predicting the Future of Administrative Law*, REGULATION 18 (May/June 1982).

Jaffe, maintained that judicial review could control and coordinate administrative actions.²²⁵ Many now see this role as too ambitious for the courts and have begun to look elsewhere for new, or at least supplementary, techniques for controlling administrative action.²²⁶

Some have argued that the President should be given broad powers to supervise and control administrative lawmaking.²²⁷ This approach to strengthening coordination and control within the Executive branch received strong reinforcement recently with the enactment of the Paperwork Reduction Act of 1980,²²⁸ which for the first time gives the President, through OMB, veto power over virtually all new rules by administrative entities.²²⁹

Others, however, dispute that control over administrative lawmaking is an appropriate role for the President, arguing for enhancing legislative control instead. They applaud the resurgence of Congress, as reflected in enhanced oversight activity and the legislative veto,²³⁰ or imagine that the nondelegation doctrine might be a way of forcing Congress to take more responsibility.²³¹ Another faction takes the position that the agencies should remain independent, insulated from politics as much as possible.²³² And finally, still others suggest enhancing judicial control by creating new causes of action for the beneficiaries of regulatory programs.²³³ From this perspective of continuing constitutional development, *Chadha* can be understood as one episode in a struggle among the three established branches of government to redefine their roles in the evolving "constitution of the administrative state," with the Court having adopted its traditional stance of joining with the Executive against the Congress.²³⁴

²²⁵ See JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

²²⁶ See BREYER, note 103 *supra*, at 3; Elliott, note 220 *supra*.

²²⁷ Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L. J. 1395 (1975); see also Executive Order No. 12291, note 218 *supra* (giving the Office of Management and Budget broad authority to review major proposed new rules).

²²⁸ 44 U.S.C. §3501 *et seq.* (Supp. V, 1981).

²²⁹ See 44 U.S.C. §3508 (administrative entities may not promulgate new rules requiring collection of any information from outside government unless Director of OMB concurs in the "necessity" for the rules).

²³⁰ See SUNDQUIST, note 97 *supra*.

²³¹ McGowan, note 8 *supra*; see also BOLTON, note 8 *supra*, at 49 (calling on Congress to enact "more carefully structured" grants of discretion instead of the legislative veto).

²³² Cf. *Sierra Club v. Costle*, 657 F.2d 298, 404-10 (D.C. Cir. 1981) (rejecting argument by the Environmental Defense Fund that interference in EPA rulemaking by Congress and White House officials after close of record was improper); see also ACKERMAN & HASSLER, note 148 *supra*, at 116-28.

²³³ See Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

²³⁴ See KURLAND, *WATERGATE AND THE CONSTITUTION* 83 (1978): the "combination of the

A lowercase constitution facilitates both experimentation with different approaches and adaptation to a changing environment to a greater degree than would be possible by amending the text of the Constitution. Using nonconstitutional sources of law to perform essentially constitutional functions has worked reasonably well. But the quasi-constitutional approach to institutional change depends for its success on there being no strong sources of tension between the rapidly evolving constitutional structure and the formal Constitution. Thus, Dam suggests that the quasi-constitutional approach has worked in the fiscal area, in part because the formal Constitution is open-textured on fiscal matters: "The lacunae in the written Constitution have been filled by Supreme Court interpretations and by statutes, which can be changed when conditions change."²³⁵

Grave difficulties can arise, however, when basic changes in institutional relationships are made without changing the text of the Constitution. It is possible to use quasi-constitutional methods to walk into the legal equivalent of a cul-de-sac: gradual, piecemeal modifications of institutional relationships may be upheld as constitutional (as broad delegations of legislative power have been), but doctrines may be lacking that permit the meaning of other, related parts of the formal constitutional structure to be altered if the new institutional developments have "mere" statutory sources. This is becoming an increasingly serious problem as the importance of administrative lawmaking continues to grow; hence "the uneasy constitutional position of the administrative agency."²³⁶

The problem can be illustrated by imagining that there had been a formal amendment to the Constitution establishing a Fourth Branch. Lawyers do not have much difficulty conceiving that established meanings change as a result of modifications that are embodied as changes to the text of the Constitution (or Supreme Court interpretations, which are another way of incorporating change into a text). Amendments to one part of a text may change the meaning of other provisions whose language remains the same; the new and old are read together and a new whole is created. Thus, the Fourteenth Amendment changes the meaning of the First Amendment by revising the relationship between federal and state governments.

executive branch and the judicial branch against the congressional branch . . . is pervasive in our constitutional history, except on rare occasions."

²³⁵ Dam, note 207 *supra*, at 274.

²³⁶ See note 205 *supra*.

An amendment creating a Fourth Branch of government would also have altered existing constitutional relationships. The amendment might have made it clear that neither the Congress nor the President was to have a veto over actions by administrative bodies. Indeed, if the imaginary Fourth Branch amendment had been adopted in 1946, when the Administrative Procedure Act was passed, it probably would have embodied the then prevailing (and since discredited) theory that judicial review alone would be adequate to control administrative discretion. But leave the particular content of the Fourth Branch amendment aside for the moment. The point is that inevitably an amendment would have affected other portions of the structure and relationships created by the Constitution;²³⁷ a coherent, new whole is created each time a text is changed, either by amendment or judicial interpretation.

Therein is the crux of Justice White's problem in *Chadha*: the "most significant legal trend of the last century" was not accomplished by amending the Constitution, but by developing a constitution of the administrative state piecemeal. The problem cannot be solved now by adopting an amendment to the Constitution codifying the results, even if that were politically feasible. The process of quasi-constitutional evolution is still proceeding too rapidly to be fixed in a formal amendment to the Constitution, and it is questionable whether the need for change and experimentation in this area will ever diminish to the point at which an amendment to the Constitution would become practical. The solution must be to find a way to interpret the Constitution so that quasi-constitutional developments and the original text can be harmonized.

C. CHADHA REVISITED

Justice White's argument in *Chadha* goes astray once he concedes that the "wisdom and the constitutionality of . . . broad delegations [to administrative lawmakers] are matters that still have not been put to rest."²³⁸ On the contrary, it is hard to imagine any proposition of constitutional law that is more firmly established *de facto* than that law may be made by administrative institutions acting under broad delegations. It would be fatuous to believe that the courts are actually capable of declaring unconstitutional the vast administrative apparatus

²³⁷ See generally BLACK, note 184 *supra*.

²³⁸ 103 S. Ct. at 2802.

that has developed during the fifty years since the New Deal, no matter how suspect its foundations may be in terms of existing legal doctrines. The administrative state exists. It is beyond the practical power of the Supreme Court to make it go away or even to modify its essentials significantly. Sooner or later constitutional doctrines will have to be modified accordingly. When institutional reality refuses to accommodate itself to legal doctrine, eventually doctrine has to accommodate itself to reality.

In principle, moreover, broad delegations of lawmaking authority to administrative decisionmakers are not some accident or incidental development that has come about through a combination of judicial timidity and congressional laziness, although undoubtedly there are particular statutes which are ill-advised or poorly drafted. The growth of administrative lawmaking over the half-century since the New Deal has been fueled by fundamental political and cultural currents²³⁹ that the law is powerless to reverse and to which it must therefore accommodate itself.

The existence of a sprawling administrative bureaucracy with broad powers to make law should no longer be regarded as an open constitutional question. It is constitutional fact. It must become one of the fundamental premises from which our reasoning about constitutional structure and relationships begins. In this sense, the rise of administrative lawmaking, although accomplished gradually and without benefit of a formal amendment to the Constitution, now constitutes an amendment to the Constitution *de facto*. The changes in structure and working relationships which are hinted at by the term "the administrative state" are at least as fundamental as any of the changes in governmental institutions that have been embodied in constitutional amendments during the twentieth century.²⁴⁰

It is a necessary first step to acknowledge that administrative lawmaking under broad delegations is constitutional, but it is only a first step. Next must come a recognition that the Constitution as a whole changes not only when the text changes, but also when its institutional context changes. No text draws meaning from its words alone. Meaning is also determined by a context, which includes a

²³⁹ See Schuck, *The Politics of Regulation*, 90 YALE L. J. 702, 725 (1981); see also Elliott, *Anthropologizing Environmentalism*, 92 YALE L. J. (1983) (forthcoming).

²⁴⁰ Cf. Amendment XVI (income tax); Amendment XVII (direct election of Senators); Amendment XXII (President limited to two terms). It could be argued, however, that the federal income tax is the change in the framers' design that has made possible the growth of the federal government described in the text.

structure of institutional relationships in which the text is embedded. Imagine, for example, a constitution with words identical to ours, but without the inferior federal courts. Although the words would be the same, inevitably meanings would have diverged because of the different institutional contexts in which the words would be set.²⁴¹

Despite its obvious importance, institutional context did not often present major problems for constitutional interpretation until this century. The basic structure of government either was established in the Constitution itself, or fundamental changes to it were ratified through amendments or interpretations by the Supreme Court, and thereby were incorporated into the text itself. But in the twentieth century this tradition has eroded and we have come to rely more and more on quasi-constitutional sources of law to create and shape the institutional context on which the meaning of the Constitution depends.

From a lawyer's perspective, the resulting problem is how the meaning of our fundamental law, the Constitution, can be affected by "mere" statutory sources of law such as the lowercase constitution of the administrative state. One possible answer is through the Necessary and Proper Clause, which Justice White mentions in *Chadha* but does not exploit.²⁴² Part of the wisdom of the framers of the Constitution was their recognition that they could not anticipate more than the most rudimentary outlines of the government that would be necessary if the enterprise they launched were to succeed. The text of the Constitution does not purport to create all necessary institutions once and for all. Instead, the Constitution gives Congress power to create such institutions as shall be necessary and proper to carry into effect the powers of government.²⁴³ The changes in the structure of government encompassed under the rubric "the administrative state" were, ultimately, created through Congress's exercise of its powers under the Necessary and Proper Clause. As such, these institutions are as much a part of the structure and relationships established by the Constitution as if they were created in the text itself.²⁴⁴

This is not to say that the legislative veto is constitutional. But it is to say that the majority in *Chadha* was wrong—dead wrong—to dismiss Justice White's arguments about the rise of the administrative

²⁴¹ See also SCHUCK, *SUING GOVERNMENT* 169–81 (1983).

²⁴² 103 S. Ct. at 2801 (White J., dissenting).

²⁴³ See *First National Bank v. Fellows ex rel. Union Trust Co.*, 244 U.S. 416, 419 (1917).

²⁴⁴ In his Storrs Lectures, delivered after the present article was in press, Professor Bruce Ackerman develops several parallel ideas. See Ackerman, "Discovering the Constitution"

state as mere points of policy irrelevant to the constitutional question. Administrative lawmaking is now a central part of the Constitution. The task for the Court should have been to reinterpret the Constitution to create a harmonious new whole, just as that would have been the Court's task if a Fourth Branch had been created by constitutional amendment.

The legislative veto at issue in *Chadha* is unconstitutional, not because the words of Article I read in splendid, sterile isolation prohibit all legislative vetoes, but because this particular legislative veto is inconsistent with the Constitution, the administrative state included. The legislative veto at issue in *Chadha* is not unconstitutional because it is an attempt by Congress to exercise legislative power without following the proper procedures for legislation, as the Court held, but because it is an attempt by Congress to exercise powers that can no longer properly be considered legislative. Whatever role the framers may have intended for private bills in immigration cases originally, today it has become an administrative function to say whether an individual case involves "extreme hardship." Thus, the legislative veto is inconsistent with the scheme of the Immigration and Nationality Act as a whole, and with our evolving notions of what constitutes a proper legislative function. In the context of suspensions of deportation for individual aliens, the legislative veto therefore violates what John Marshall called the "spirit of the Constitution," and what today we might call due process, or the deep structure of the Constitution's evolving grammar.

The Court decided *Chadha* too broadly and on the wrong grounds. In the end, however, those are not the reasons why the case is so troubling. What is haunting about *Chadha* is the revelation that the Supreme Court has not yet developed a theory to harmonize administrative lawmaking and the Constitution. If need be, the law will survive the loss of the legislative veto. There will be real trouble, however, if the Court has forgotten that there is more to the Constitution than just words.

(Lectures delivered at the Yale Law School, November 8-10, 1983). Ackerman also portrays the New Deal as bringing about fundamental changes which are tantamount to amending the Constitution. According to Ackerman's theory, however, the legitimacy of these changes depends largely upon the "critical election" of 1936. The present article, on the other hand, conceives of a de facto amendment to the Constitution as coming about through a gradual process of related developments and community acceptance, like the common law.